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## SUPREME COURT OF THE UNITED STATES.

No. ~~139.~~ 2 2

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

**FILED AUGUST 25, 1876.**

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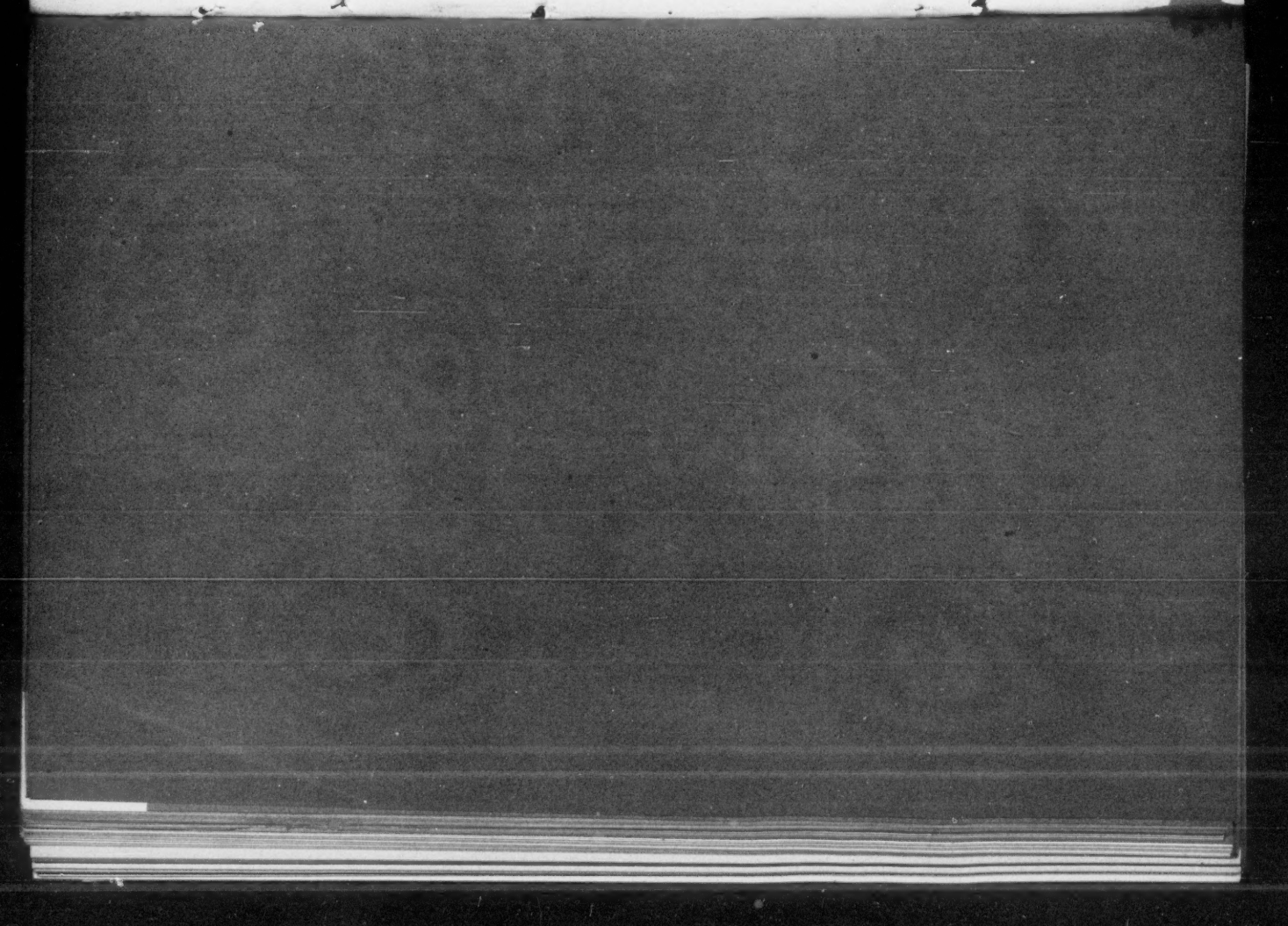

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1 Supreme court of Alabama.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and held according to law, at the capitol, in the city of Montgomery, on the first Tuesday of December, in the year of our Lord one thousand eight hundred and seventy-five, it being the seventh day of said month.

Present, and presiding as judges of said court, honorable Robert C. Bickell, chief justice; honorable Amos R. Manning, associate justice.

Transcript from the chancery court of Montgomery County, Alabama, in a certain cause therein pending, wherein the South & North Alabama Railroad Company is complainant and the State of Alabama is defendant. Filed in the supreme court of Alabama, June 10th, 1875.

T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

*Transcript.*

To the honorable A. C. Felder, chancellor of the southern chancery division of the State of Alabama:

1. Your orator, the South and North Alabama Railroad Com-
2 pany, a corporation created by and organized under the laws of Alabama, complaining, states that the three-per cent. fund was and is a trust fund, originally created, reserved, and granted by the Congress of the United States by an act entitled "An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States," approved March 2nd, 1819, for certain objects disclosed in said act of Congress, and the subsequent acts of Congress and of the legislature of said State, relating to said fund, and to be applied to those objects under the direction of the legislature of said State, as more fully appears in the several acts above referred to, all of which are herein referred to, and are hereby and by this reference made part of this bill, and prayed to be deemed and taken as part of this bill. That the legislature of said State, acting for said State and exercising its legitimate powers, accepted said trust fund, and the said State by its legislature accepted and received said trust fund, and became the trustee as to said fund; that afterwards the legislature of said State, by its act entitled an "An act to loan and appropriate the three-per-cent. fund, and its interest, approved February 18th, 1860," ascertained and declared the sum of eight hundred and fifty-eight thousand four hundred and ninety-eight dollars to be the amount then due
3 as principle and interest from the said State to the said three-per-cent. fund, and declared and provided that six hundred and sixty-three thousand one hundred and thirty-five dollars of said last above mentioned amount should be loaned and appropriated as enacted in said last above-mentioned act of February 18th, 1860, as more fully and at large appears by said last-mentioned act, which is here referred to, and prayed to be deemed and taken as part of this bill.

2nd. Your orator further states that afterwards the legislature of said State, by its act approved February 7th, 1861, entitled "An act to amend an act entitled An act to loan and appropriate the three-per-cent. fund, and its interest," ratified and made effectual the conveyance by the said Tennessee and Alabama Central Railroad Company to the Mountain Railroad Contracting Company of all the powers, rights, privileges, and donations which were conferred upon the Tennessee and

Alabama Central Railroad Company by said act of February 18th, 1860, as more and at large appears by said act of February 7th, 1861, which is here referred to, and is prayed to be deemed and taken as part of this bill; that on said 7th day of February, 1861, the Mountain Railroad Contracting Company became and was the beneficiary of the three-per-cent. fund, loaned and provided to be loaned to certain railroad companies under said act of February 18th, 1860, and was ever
4 afterwards such beneficiary, and recognized and treated by said State and its legislature as such beneficiary, until the Mountain Railroad Contracting Company made to your orator the transfer of all the assets, rights, privileges, and immunities then or theretofore enjoyed, held, or possessed by the Mountain Railroad Contracting Company, either by contract or otherwise (including all the rights of said last mentioned company to the three-per-cent. fund), which was authorized by an act of the legislature of said State entitled "An act to amend an act entitled An act to incorporate the Mountain Railroad Contracting Company," approved December 30th, 1868, as well as by an act of the legislature of said State entitled "An act to amend an act entitled An act to amend an act entitled An act to incorporate the South and North Alabama Railroad Company," approved December 30th, 1868, both of which last-mentioned acts are here referred to and prayed to be deemed and taken as part of this bill; that the said transfer by the Mountain Railroad Contracting Company, under and in pursuance of said two acts last above mentioned, was made to and accepted by your orator under and in pursuance of said two acts last mentioned after their approval and before the first day of December, 1871; and that ever since said transfer and acceptance thereof
5 your orator has been and is still the beneficiary cestui que trust, as well as equitable owner of the three-per-cent. fund, which was authorized to be loaned to certain railroad companies by and under said act of February 18th, 1860, including the sum of two hundred and twenty-five thousand dollars of said three-per-cent. fund, which said last mentioned act enacted should be loaned to the Alabama and Tennessee River Railroad Company; and also including the forty thousand dollars of said three-per-cent. fund which said last-mentioned act enacted should be loaned to the Selma and Gulf Railroad Company.

3. Your orator further states that the name of the Tennessee and Alabama Central Railroad Company before the 30th day of December, 1868, was changed to the Nashville and Decatur Railroad Company, under and in accordance with the act of the legislature of said State entitled "An act to change the name of the Tennessee and Alabama Central Railroad Company," approved February 19th, 1867; that the railroad which is described in said act entitled "An act to amend an act entitled An act to amend an act entitled An act to incorporate the South and North Alabama Railroad Company," approved December 30th, 1868, as "a railroad from Decatur to some point on the Alabama and Tennessee River Railroad, at or near Montevallo," is the same railroad which is somewhat differently described in the 5th & 6th sections of said act of February 18th, 1866, and perhaps in some other acts of the legislature, and
6 is the same railroad which is mentioned as "The railroad between Decatur and the Alabama and Tennessee River Railroad" in the act of the legislature of said State entitled "An act to amend an act entitled An act to extend the period of the grading of the Tennessee and Alabama Central Railroad from Decatur to a point a few miles east of Montecello (Montevallo), approved October 7th, 1864, by allowing a further extension of the period for such grading," approved August

7th, 1868, and is the only railroad which has ever been projected between Decatur and any point on the Alabama and Tennessee River Railroad, and provided for, or aided, or encouraged in any way by the legislature of said State; the grading of said railroad designated and intended in said several acts of the legislature and the preparation of said railroad for its superstructure were completed before the 1st day of September, 1872, from Decatur to the point within seven miles of Montevallo, on the Alabama and Tennessee Rivers Railroad (now known as the Selma, Rome and Dalton Railroad), the point of intersection of these roads, which point until recently was known as Limekiln, and is now known as Calera; that the said railroad from Decatur to said point now known as Calera, was completed and trains regularly running thereon, and through to Montgomery, before October 1st, 1872, and was then and is still the property of your orator, and is kept in regular operation in the service of the public and in the transportation of passengers and freight
7 from Decatur by said point now known as Calera, continuously, through to Montgomery in said State; that the grading of said railroad, as well as its preparation for its superstructure, and also its construction and equipment, were prevented and stopped by the military operations of the parties to the late war between the United States and the Confederate States, and that but for this war and for said prevention caused by said war, the grading of said railroad and its preparation for its superstructure, as well as its construction and equipment, would have been completed before the expiration of five years from the commencement of the grading of said railroad; and that the grading of said railroad was commenced in compliance with the provisions of said act of February 18th, 1860, within twelve months from the passage of that act, and the entire construction and equipment of said railroad would have been completed within five years from that time, but for said war and the actual disabilities caused by that war.

4. Your orator further states that under and in accordance with the provisions of said act of February 18th, 1860, and not long after its passage, two hundred and twenty-five thousand dollars, the same being part and parcel of said three per cent. fund, and part and parcel of said six hundred and sixty-three thousand one hundred and thirty-five
8 dollars, mentioned in the first section of said act, was loaned to the Alabama and Tennessee Rivers Railroad Company, upon bond and mortgage of lands, and secured to the satisfaction of the governor of said State, as provided in said act; that before the maturity of said loan, and without the assent of the Tennessee and Alabama Central Railroad Company, or of the Mountain Railroad Contracting Company, or of orator, the legislature of said State passed an act entitled "An act to authorize the sale of lands mortgaged to the State," approved November 4th, 1862, a copy of which, marked "Exhibit A," is hereto attached as part of this bill; that under this act of November 4th, 1862, without the assent of any one of the three companies last above named, or of any beneficiary of said trust fund, the Alabama and Tennessee Rivers Railroad Company paid into the treasury of said State an amount equal to the entire principle of the sum loaned to said company as aforesaid, and the interest thereon up to the time of such payment, as of the proceeds of the sale of the lands mortgaged to secure that loan, to be credited on the indebtedness of that company on account of that loan, and the same so paid by that company was accepted and received by the treasurer and governor of said State, and was credited on the indebtedness of that company; an account of that loan by said treasurer and governor and
9 the said bond and mortgage given as above said, to secure that

loan, were surrendered, as paid and discharged to that company by said treasurer and governor, and the lien under said mortgage was thereby surrendered and divested, and that company has since been wholly insolvent, and remains hopelessly insolvent, and no part of said amount of said three per cent. fund loaned to that company, or of the interest thereon, has ever been paid or received by your orator, or by the Tennessee and Alabama Central Railroad Company, or by the Mountain Railroad Contracting Company, and said State has never, by its legislature, or otherwise, done anything to make any one of said beneficiaries of the three per cent. fund to recover any part of that loan, but has steadily kept each of the beneficiaries of said fund disabled from recovering any part of that loan from the Alabama and Tennessee Rivers Railroad Company, and has steadily failed and refused to account for and pay over that loan, or the interest thereon, and the whole of the said amount of said three per cent. fund loaned to the Alabama and Tennessee Rivers Railroad Company as aforesaid, with the interest thereon, is now due to your orator by and from the State of Alabama, trustee as hereinabove described.

10 5. Your orator further states that the sum of forty thousand dollars of said three per cent. fund of said six hundred and sixty-three thousand one hundred and thirty-five dollars, mentioned in the first section of said act of February 18th, 1860, which the said act provided to be loaned to the Selma and Gulf Railroad Company, upon the terms shown in said act, was not loaned to that company as provided in said act, but instead thereof, the legislature of said State passed an act in relation thereto, entitled "An act in relation to the Selma and Gulf Railroad Company," approved December 5th, 1861, a copy of which, marked "Exhibit B," is hereto attached, as part of this bill. Under said last-mentioned act, and soon after its passage, and during the late war, the said forty thousand dollars, part and parcel of said three per cent. fund, which the said act of February, 1860, enacted to be loaned to the Selma and Gulf Railroad Company as therein shown, was loaned to the Alabama and Mississippi Rivers Railroad Company for the purposes shown in said act of December 5th, 1861, and to aid the late rebellion against the United States, and the collection of any part of that loan, or of the interest thereon, has been actually defeated and is legally impossible by reason of the fact that that loan was made in aid of said rebellion and was illegal, as well as of the further fact, that the

11 Alabama and Mississippi Rivers Railroad Company has long ago ceased to exist, and was hopelessly insolvent long before it ceased to exist. That loan was made to that company without the assent of the Tennessee and Alabama Central Railroad Company, or of the Mountain Railroad Contracting Company, or of orator, and in plain violation of the trust reposed in said State and its functionaries, and caused the loss of the said amount of said trust fund so loaned, and the interest thereon. Notwithstanding all this, the said State, as well as its legislature, has steadily failed and refused to pay to your orator, or the Mountain Railroad Contracting Company, or to the Tennessee and Alabama Central Railroad Company, any part of said forty thousand dollars of said trust fund loaned under said act of December 5th, 1861, as aforesaid, and lost as aforesaid, or do anything in respect thereto, except to tender to your orator through its governor, under the act of the legislature of said State, entitled "An act relating to the three per cent. fund," approved December 30th, 1868, the illegal, void, and worthless so-called bond and mortgage, upon which the Alabama and Mississippi Rivers Railroad Company obtained the loan of said forty thou-

sand dollars under said act of December 5th, 1861. When said illegal, void, and worthless bond and mortgage were so tendered to
12 your orator they were not accepted or voluntarily taken in payment or discharge of the just claim of your orator upon said State, in respect to this trust fund so illegally loaned by said State, and thereby lost, but your orator took possession of said illegal, void, and worthless bond and mortgage in ignorance of the real and material facts which have since come to its knowledge, and in the hope and belief that possibly it might be able to collect the whole or a part of said forty thousand dollars, and thus relieve the State to that extent. Your orator, with due diligence and in good faith set up said bond and mortgage as a claim against said Alabama and Mississippi Rivers Railroad Company (then existing and known as the Selma and Meridian Railroad Company) and its property, in a court of competent jurisdiction, but was met and defeated by allegation and proof that said bond and mortgage were illegal and void, for the reason and facts hereinabove stated. Your orator states that said State as trustee is liable to it for said forty thousand dollars of said trust fund illegally loaned to the Alabama and Mississippi Rivers Railroad Company, and thereby lost, and the interest thereon.

6. Your orator's principal office and principal place of business is in the city and county of Montgomery in said State.

13 7. Your orator further states, that the said State has not, fairly accounted for, and paid over to your orator or to the Mountain Railroad Contracting Company, or to the Tennessee and Alabama Central Railroad Company the several sums of money of said three per cent. fund, which said act of February 18th, 1860, enacted to be loaned, and which were in fact loaned under said act and not long after its passage to the Alabama and Tennessee Rivers Railroad Company, and to the Wills Valley Railroad Company and to the Northeast and Southwest Alabama Railroad Company, respectively, and the interest thereon; nor has said State fairly accounted for and paid over to your orator, or to the Mountain Railroad Contracting Company or to the Tennessee and Alabama Central Railroad Company, any part of the said forty thousand dollars of said trust-fund, which the said act of February 18th, 1860, enacted to be loaned to the Selma and Gulf Railroad Company, and which forty thousand dollars was wasted and lost by the improper, wrongful, and illegal act and conduct of said State and its legislature hereinabove referred to; that the said State in its conduct and action in relation to said three per cent. fund since February 7th, 1861, has availed itself of its advantage as possessor of the legislative as well as other governmental power of the State to compel, and has thus
14 compelled each of the corporations created by itself, which in turn was the beneficiary and cestui que trust of said trust-fund, to accept what the said State might offer, tho' greatly less than was just, proper, and due from said State, as trustee, and to drive, and has driven, hard and unconscionable bargains with each of such beneficiaries in settlements or arrangements with said State as to said trust-fund contrary to equity and good conscience, and in violation of the obligations and duties of said State as trustee of said trust-fund, instances of which in equitable conduct and action of said State are disclosed in this bill. Your orator at the last session of the legislature of said State, as at former sessions thereof, made earnest and all proper efforts to procure through the action of that body a full and final settlement with said State, as trustee of said trust-fund, and as an inducement to such settlement your orator offered in good faith to take less than is justly

due to it out of, or on account of said fund; but each and every such effort has failed, and has failed without any fault on the part of your orator, who has ever been and is still willing and here would offer to do whatever is equitable touching said trust-fund and the settlement of said State as the trustee of said fund.

8. Your orator prays that the State of Alabama, trustee as herein above shown, be made a party defendant to this bill; that process according to law and the rules of your honor's circuit issue to said State as such defendant, requiring said defendant to answer this bill; that an account be taken to ascertain the sum due by said State as trustee for and on account of the said three per cent. fund enacted by said act of February 18th, 1860, to be loaned as therein provided; that on final hearing of this cause, a decree be rendered in favor of your orator against said State for the amount so found to be due by the State as trustee as aforesaid, and that your honor's court will decree and grant unto your orator all such other, further, and general relief as to equity belongs or to your honor may seem meet.

RICE, JONES AND WILEY.
*Sol's for Complainants.*

NOTE.—The defendant in the foregoing bill is required to answer each allegation and statement thereof, but without oath; the defendant's oath to its answer is waived.

RICE, JONES & WILEY,
*Sol's for Complainants.*

EXHIBIT A.

An act to authorize the sale of lands mortgaged to the State.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened, That the Alabama and Tennessee Rivers Railroad Company, asking by their board of directors, be, and they are hereby, authorized to sell the lands mortgaged by said company to the State, as security on account of the loan to the company of a portion of the three per cent. fund, or so much there of as the said board may deem it advantageous to sell and shall be approved by the governor: Provided, that no such sale shall be effectual to divest the lien of the State under said mortgage until the proceeds thereof shall be paid into the treasury, to be credited on the indebtedness of said company on account of said loan.

Approved November 4th, 1862.

EXHIBIT B.

An act in relation to the Selma and Gulf Railroad Company.

Whereas, by an act approved the 18th February, 1860, entitled an act to appropriate the three per cent. fund, a loan of forty thousand dollars was made to the Selma and Gulf Railroad Company, upon certain conditions in said contained; and whereas said Selma and Gulf Railroad Company have complied with all the conditions required of them in order to obtain payment of the sum so loaned; and whereas said railroad company, in the present condition of the country, are willing to postpone the payment to them of said sum of money

until the present war is ended; and whereas the Alabama and Mississippi Rivers Railroad Company are now actively engaged in building a railroad from Selma via Uniontown and Demopolis, so as to unite at Meridian with the railroad now completed to Vicksburg, on the Mississippi River, with the Mobile and Ohio Road and with the New Orleans and Jackson Road; and whereas the Alabama and Mississippi Rivers Railroad forming a connection between the waters of the Alabama and Mississippi Rivers with the Northwest and with New Orleans, is essential to the government in the existing war for the transportation of troops, munitions of war, provisions, and the public mails:

SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama in general assembly convened, That, with the consent of the Selma and Gulf Railroad Company, the payment to the said company of the said sum of forty thousand dollars be postponed until the end of the existing war and the conclusion of peace, and that upon a ratification of a treaty of peace said Selma and Gulf Railroad Company shall be entitled to demand and receive from the State treasury the said sum of forty thousand dollars so loaned, upon
18 giving bond with good security, conditioned that said sum of forty thousand dollars shall be applied alone to the purchase of iron and the laying of the same upon said railroad, and executing a first-mortgage bond on said railroad and all its rights and fixtures, to secure the repayment of said forty thousand dollars at the expiration of five years thereafter, and the interest thereon at the rate of six per cent. per annum.

SECTION 2. Be it further enacted, That in the mean time, and until a treaty of peace shall be concluded, the said sum of forty thousand dollars of the three per cent. fund be loaned to the Alabama and Mississippi Rivers Railroad: Provided, said railroad company shall execute and deliver to the governor its bond, with the most ample and satisfactory security, conditioned for the payment of the said sum of forty thousand dollars, with six per cent. per annum thereon, into the State treasury, within one month after receiving notice to make such payment, according to the terms of this act; such security to be personal, by deed of trust or by mortgage, with power of sale, as the governor may require.

Approved December 5th, 1861.

We acknowledge ourselves security of complainant for the costs of the suit commenced by the foregoing bill of complaint

April 4th, 1874.

SAM'L F. RICE.
THO'S G. JANES.

19 Filed in office April 4th, 1874.

JOHN W. HUGHES,
*Register.*

In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA.

Now comes the said State of Alabama, by its attorney-general, and

also by its solicitor, R. M. Williamson, and for answer to the bill of complaint filed in this court by the above-named complainant, reserving all right of exception and demurrer to said bill on account of its imperfections and errors, and to the right of the said plaintiff to commence and maintain its suit on said bill against this defendant, saith:

The State of Alabama admits the corporate character in which complainant sues; admits that the Congress of the United States, by enactment, on the second day of March, 1819, offered, among other things, for the free acceptance or rejection of the convention of the then Territory of Alabama, that five per cent. of the nett proceeds of the lands lying within said Territory, and which shall be sold by Congress from and after the 1st day of September, 1819, shall be reserved for
20 making public roads, canals, and improving the navigation of rivers, of which three-fifths should be applied to those objects within the State, under the direction of the legislature, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress; further admits that by subsequent act of Congress on September 4th, 1841, the said two per cent. fund was relinquished to the State of Alabama, under stipulations therein contained, and that the State accepted these reserved grants and the relinquishments on the terms offered. Respondent denies that it is a trustee of said funds, or either of them, for the use or benefit of plaintiff, or any other corporation or person; and respondent avers that as to said three per cent. fund, it held the same to be applied to the "making roads, canals, and improving the navigation of rivers within said State," as the legislature of said State may direct; and respondent further avers that it is under no obligation to apply said three per cent. fund to any particular work of internal improvement, except in so far as its legislature has appropriated or contracted to appropriate the same, and then only on the terms and to the extent as provided by said legislative enactments. Respondent further admits that its legislature, by act of February 18th, 1860, ascertained that the whole of said three per cent. fund, including interest up to the date of said enact-
21 ment, amounted to the sum of eight hundred and fifty-eight thousand four hundred and ninety-eight dollars, of which sum one hundred and ninety thousand three hundred and sixty-three dollars was declared to be due to the Tennessee and Coosa Railroad Company, and that the said act of February 18th, 1860, loaned and appropriated the balance of said fund, to wit, six hundred and sixty-three thousand one hundred and thirty-five dollars, to the several railroad companies, and on the terms and conditions in said act mentioned, in the several sums respectively as shown in the second section of said act.

Respondent, further answering the first paragraph of said bill, avers that each of said railroads to which loans were granted by said act in the 2nd section thereof accepted said loans upon the terms offered in said act, and executed respectively bonds and mortgages to secure said loans, and interest on the same, as provided in the fourth section of said act of February 18th, 1860; and respondent further avers that the said act of February 18th, 1860, by the fifth section thereof, appropriated one hundred and seventy-three thousand nine hundred and forty dollars to be paid to the said Tennessee and Alabama Central Railroad Company, upon the conditions expressed in the sixth and seventh sections of said act, and that the conditions therein expressed to be
22 precedently performed by the said Tennessee and Alabama Central Railroad Company before the right to receive said appropriation should vest in said Tennessee and Alabama Central were never

performed by said railroad company, and by said failure on the part of said Tennessee and Alabama Central Railroad Company it forfeited its right to said appropriation.

Respondent, further answering said first paragraph of said bill, avers that by the 8th section of the said act of February 18th, 1860, the said sum of $663,135, so loaned by the second section of said act of February 18th, 1860, subject to the conditions and on the terms therein expressed, was granted as an appropriation and bonus to the said Tenn. and Ala. Central Railroad Company; and by the thirteenth section it was enacted, as the true intent and meaning of said act, that in case any interest on the loans of said $663,135 to the several other railroads provided by said act shall not be collected by the State, any loss sustained by such failure of the companies to whom loans may be made shall be deducted from the said $663,135, and from the appropriation thereof to the said Tenn. and Ala. Central R. R. Company; and it was further provided that the said Tenn. and Ala. R. R. Co. "shall receive the obligations of the various railroad companies which may be taken for the loans to such companies provided for under this act if unpaid at the
23 time said Tenn. and Ala. Central R. R. Company may be authorized to apply for the appropriation provided for in the 8th section of this act, in lieu of money;" * * and that "the State shall not be bound to make good any loss which may be sustained by failure to collect said obligations or any of them." Respondent admits that the right of said Tenn. and Ala. Central R. R. Co. to the said three per cent. fund under said act of February 18th, 1860, was transferred, some time in the year 1861, to the Mountain Railroad Contracting Company by said Tennessee and Alabama Central Railroad Company, and that said transfer was ratified by the legislature of Alabama on the 30th day of July, 1868, and that said Mountain Railroad Contracting Company transferred to complainant all of its rights to said three per cent. fund, by virtue the act of the legislature of December 30th, 1868; and that all the rights to said three per cent. fund which vested in said Tenn. and Ala. R. R. Co., under act of February 18th, 1860, are by said transfer now vested in complainant, but only upon the terms and conditions of the said act of February 18th, 1860.

2. Respondent, for answer to the second paragraph of complainant's bill, as already stated, admits that complainant is entitled by the successive transfers above stated to all the rights, privileges, and im-
24 munities which vested in the said Tenn. and Ala. Central Railroad Company, and subject to all the terms, conditions, and provisos under which said Tenn. and Ala. Central Railroad Company acquired the same. But respondent utterly denies that any right whatever was acquired by force of the pretended act of the so-called legislature of Alabama, asserted to be passed on 7th day of February, 1861. And respondent avers that it is in no manner liable for or bound by any of the pretended acts of the so-called legislature of the insurgents who then held possession of the territory of Alabama and usurped the powers of government over the same during the time within the 11th day of January, 1861, and the 20th day of July, 1865; and further, that it is not bound by or liable for any of the acts or doings of the self-constituted and illegal authorities who pretended to act as the government or officers of Alabama between those dates. And for a further and more full answer to other matters of this paragraph respondent will more particularly hereinafter set out.

3. Respondent, for answer to the third paragraph of said bill, admits the identity of complainant, and its connection with and suc-

cession from various railroads, as in said paragraph mentioned; and also admits that the said line of railroad was so far completed that trains were running thereon from Decatur to Calera
25 on the 1st day of October, 1872, but not sooner, and that trains are now running on said line of railroad from Decatur to Montgomery; but resp't denies that said railroad was graded and prepared for the superstructure by the 1st day of September, 1872. Respondent further admits that the military operations of the armies of the United States and the rebel authorities interfered with the work on said line of railroad, but does not admit that the same would have been completed but for such military operations; and respondent avers that a tender regard for the enterprise in building and equipping a line of railway between Decatur and a point at or near Montevallo, on the Alabama and Tennessee River Railroad, and a desire to aid in the same induced respondent to overlook many shortcomings and failures on the part of complainant and those corporations to whose rights and privileges it has succeeded to comply with the terms and conditions upon which the appropriation and loan was granted by the act of February 18th, 1860, as is evidenced by the acts of its legislature passed on the 30th day of July, 1868, and on the 7th day of August, 1868, and by many other acts of indulgence and favor shown to complainant.

26 4. Respondent, for answer to the fourth paragraph of complainant's bill, admits that the sum of $225,000 of said three per cent. fund was loaned to the said Alabama and Tennessee Rivers Railroad Company under the 2nd section of said act of February 18th, 1860, and that a bond and mortgage were taken by respondent for payment of the interest on said loan, and the repayment of said loan at the expiration of five years from date of said loan; but respondent denies that the "legislature of said State (this respondent) passed an act entitled 'An act to authorize the sale of lands mortgaged to the State," approved November the 4th, 1862. Respondent admits that the insurgent authorities, then having control of the territory of Alabama, and illegally usurping the authority to act as the government of Alabama, did pretend to pass such act, but the same was without authority, illegal, and void, and every act done under such pretended authority by the said usurpers and the said Alabama and Tennessee River Railroad Company were illegal and void; and any payment or pretended payment made by said Alabama and Tennessee Rivers Railroad Company for or on account of said loan to it under the act of the 18th February, 1860, to the said rebel authorities or their agents, was and is utterly void
27 as payment of said loan, and respondent avers the same had no effect whatever to satisfy or extinguish the said bond and mortgage so given as a security for said loan and interest; and that the surrender by said rebel authorities of the said bond and mortgage were without lawful authority, an usurpation, and void.

And respondent further avers that the said Alabama and Tennessee River Railroad Company is still liable on said bond and mortgage, and that complainant's rights to the same under the said act of February 18th, 1860, and subsequent acts of the legislature are unimpaired by any of said acts of usurpation, and respondent denies that any portion of the payment by said Alabama and Tennessee River Railroad Company to the said insurgent authorities of interest, or of the pretended payment of said loan, ever was received by the treasurer or governor of said State of Alabama, or ever went into the treasury of said State. And respondent, further answering, says that if any such pretended payment was ever made by the said Alabama and Tennessee River Railroad

Company, the same was made to said insurgent authorities in the illegal and worthless treasury notes issued by said insurgent authorities on the credit of the so called Confederate States, on the credit of the
28 illegal and usurped authority of said insurgents pretending to act as the officers of the State of Alabama. And respondent, further answering, denies that it has ever done any act to prevent complainant from prosecuting its rights to the bond and mortgage of the said Alabama and Tennessee River Railroad Company, or to the amount of said loan to said Alabama and Tennessee River Railroad Company, under the said act of February 18th, 1860, and the subsequent acts of the legislature; and respondent denies its liability to complainant by any loss of said loan arising from the default of the said Alabama and Tennessee River Railroad to pay the same, that the only right of complainant to said $225,000 so loaned to said Alabama and Tennessee River Railroad Company is by virtue of said act of February 18th, 1860, and the said act by the 13th section thereof provides expressly, that if at the time complainant is entitled to receive said loan the same remains unpaid, then complainant (by right of the transfer aforesaid) shall receive the obligations which may be taken for such loan, and shall have the "benefit of all the rights, securities, and remedies provided for in relations to loans authorized to be made to other railroad companies, under the provisions of this act, and the State shall not be bound to make good any
29 loss which may be sustained by failure to collect said obligations or any of them," that the "rights and remedies" provided by said statute are free to be exercised and prosecuted by this respondent.

5th. For answer to the 5th paragraph of complainant's bill, respondent says that it is true that by said act of February 18th, 1860, the Selma and Gulf Railroad Company was entitled to receive out of said $663,135 the sum of $40,000; that the said Selma and Gulf Railroad did not receive said loan previous to the commencement of the late rebellion, although it applied for the same within the time stipulated in the said act, but in the mean time the illegal and insurgent government which had usurped control over the territory of Alabama, and the powers of government over its people and institutions, undertook to divert said fund from the Selma and Gulf Railroad, and by a pretended act of the insurgent legislature on the 5th of December, 1861, provided that said sum be loaned to the Alabama and Mississippi Rivers Railroad, for the purpose of aiding and abetting the said insurgents in their hostilities to the lawful authorities of the United States; that the said Selma and Gulf Railroad was thus deprived of the said loan, until sometime in the year 1871, when the same was paid over to said Selma and
30 Gulf Railroad Company, under a writ of mandamus, issued by the supreme court at the June term, 1871, to the treasurer of the State; that the time for which said loan was granted will not expire until 1876; that the said Selma and Gulf , filed in the office of the auditor of the State its obligations to faithfully appropriate and repay said loan and interest, which obligations may be received by complainants, whenever it applies for the same, as provided in said act of February, 1860.

6. Respondent admits that the principal office of complainant is in the city of Montgomery.

7. For answer to the 7th paragraph of complainant's bill, respondent denies that it has not fairly accounted to complainant for its interest in said three per cent. fund; and for a full answer to said paragraph says that soon after the passage of the act of February 18th, 1860, under the provisions thereof, $663,000 of said three per cent fund was loaned

to the following railroads, to wit: To the Northeast and Southwest R. R. Co., $218,000; Wills Valley R. Ro. Co., $75,000; Opelika and Oxford R. R. Co., $50,000; Selma and Gulf R. R. Co. (received in 1871), $40,000; Cahaba, Marion and Greensboro' R. R. Co., $25,000; Montgomery and Eufaula R. R Co., $30,000; Alabama and Tennessee R. R. Co., $225,000; that on the 6th of October, 1869, complainant re-
31 ceived all of the obligations of the various railroads above named, which had been deposited with respondent as security for said loans, except the Alabama and Tennessee R. R., and the Selma and Gulf R. R.; that the N. E. & S. W. Ala. R. R., and the Wills Valley R. R., had before that time been consolidated, under the name of the Alabama and Chattanooga R. R. Co., and the obligations of said last named company were received by complainant, all of which were so received by complainant in full satisfaction of its claims upon said three per cent. fund, under said act of February 18th, 1860, except that portion thereof which had been loaned to the Alabama and Tennessee R. R. Co., and the Selma and Gulf R. R. Co., as to the condition of which reference is made to the preceding statements in this answer; respondent further answering, denies that any hard bargains had been forced upon complainant in regard to its claims upon any of said loans to other railroads under the act of February 18th, 1860, but instead thereof every facility has been offered and afforded to the complainant to enable it to reap the advantages granted to it by said act; respondent further answering, says, that complainant has received from said Railroads or some of them, in addition to the obligations above related, previous to the 6th day of October, 1869, eight semi-annual instalments
32 of interest, accruing on said loans, under the 5th section of the act of February 18th, 1860, amounting to the sum of $134,154. Respondent having fully answered said bill, prays that the same be dismissed out of this court, and that respondent be allowed its costs, most unjustly expended in this suit.

B. GARDNER,
*Attorney-General.*
R. M. WILLIAMSON,
*Sol. for the State.*

Filed in office, May 20th, 1874.

JOHN W. HUGHES,
*Register.*

The State of Alabama, to any sheriff of the State, greeting:

You are hereby commanded to summon the State of Alabama, to appear and plead to, or answer, within thirty days from the service hereof, the bill of complaint filed in the chancery court for the second district of the southern chancery division, at Montgomery, against the State of Alabama, by the South and North Alabama Railroad Company. You must serve a copy of said bill upon the governor of Alabama, his excellency David P. Lewis, at the time you serve this summons upon
33 him as such governor.

Witness the hand of the register and the seal of said chancery court this the 4th day of April, A. D. 1874.

JOHN W. HUGHES,
*Register, &c.*

Received in office 4th day of April, 1874.

PAUL STROBACH, *Sheriff.*

Executed by serving upon and delivery to the governor of Alabama, his excellency David P. Lewis, a copy of the within summons and a correct copy of the original bill mentioned in the within summons.

April 4th, 1874.

PAUL STROBACH, *Sh'ff.*

*Agreement of Counsel.*

In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA. } 952.

It is agreed in this case—

1. That complain't may file within ninety days after the adjournment of this court an amendment to its original bill or amended bill.

2. That notice of said proposed amendment and copy of same are hereby waived.

3. That defendant reserves the right to move to strike said amendment or amended bill from the files and to except to the same or any
34 portion thereof upon any ground which would be good as a ground of objection to the allowance of such amendment except as to notice and copy of the same.

4. That defendant also reserves the right to demur to said amended bill or amendment to said original bill, and nothing in this agreement shall be construed into a consent to pl'ff's filing an amendment or amended bill not authorized or allowable by the rules of this court as to amendments to bills.

May 28, 1874.

R. M. WILLIAMSON,
*Sol. for Defendant.*
RICE, JONES & WILEY,
*Sol's for Complainant.*

Filed in office May 28th, 1874.

J. W. HUGHES,
*Register.*

MAY 28*th*, 1874.

Court met pursuant to adjournment.

Written agreement of parties now filed by the parties with the register, and complainant allowed to file his amendment in accordance therewith.

NOVEMBER 28*th*, 1874.

Court met pursuant to adjournment.

Upon motion of complainants' solicitors, supported by affidavit, leave to file an amended bill is extended for thirty days.

35 *Affidavit of Samuel F. Rice.*

In chancery at Montgomery, November 29th, 1874.

THE SOUTH AND NORTH ALABAMA RAILROAD CO.
*vs.*
THE STATE OF ALABAMA.

Before me, John W. Hughes, register in chancery, personally appeared

Samuel F. Rice, who being duly sworn states that the amendme t of this bill authorized to be made by the agreement and order of last term was not prepared and is not yet prepared because of obstacles not then foreseen, and also because of the belief produced upon the minds of solicitors for complainant by repeated conversations with M'r Williamson, solicitor for def't, both before and since the commencement of the present term, that no advantage would be claimed or injury result to complainant from the delay in preparing the amendment, and affiant is confident now that if M'r Williamson were in court he would cheerfully consent to an extension for thirty days of the leave to amend from which he knows no injury can result to defendant. Among the obstacles producing the delay is the absence or loss from the official files at the capitol of the evidence showing what bonds, obligations, or mort-
gages were received from defendant on account of the three per
36 cent. by the ultimate cestui que trust of that fund under the act of February 18th, 1860, and other acts mentioned in original bill. Solicitors for complainants after repeated efforts have not yet been able to supply that absence or loss, which is essential or very material in the case, but which affiant now believes can be supplied within the next thirty days, and as soon as it is supplied the amendment can be immediately perfected and filed. Another obstacle producing the delay was the want of an order from the chancellor of the middle chancery division (Chancellor Turner), either granting or refusing to complainants leave to make the Selma and Gulf Railroad Company or the receivers thereof a party defendant to the present suit, which order has recently been obtained and refuses the leave. This application for the extension is not made for delay, but to present the case fully and fairly and to have equity therein fully administered.

SAM'L F. RICE.

Sworn to and subscribed before me Nov. 28, 1874.

JOHN W. HUGHES,
*Register.*

Filed in office November 28, 1874.

J. W. HUGHES, *Register.*

*Decree extending time to file amendment.*

37 In chancery at Montgomery

THE SOUTH AND NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA. } No. 952.

NOVEMBER 28, 1874.

In this cause on motion of the solicitors of complainants and on consideration of the affidavit of Samuel F. Rice, filed in support of said motion, it is ordered that complainant have leave to file within thirty days from the date of this order "an amendment to the original bill, or an amended bill," subject, however, to all the limitations and reservations contained in the agreement of the solicitors made in this cause, on the 28th day , 1874, and now on file in this court.

November 28, 1874.

H. ANSTILL,
*Chancellor.*

NOVEMBER 28TH, 1875.

Court met pursuant to adjournment.

Upon motion of complainant's solicitors, supported by affidavit, leave to file amended bill is extended for thirty days.

38 To the honorable Huriosco Austill, chancellor southern chancery division of the State of Alabama:

1. Your orator, the South and North Alabama Railroad Company, a corporation created, organized, and existing, under and by virtue of the laws of Alabama, states that heretofore, to wit, on the 4th day of April, A. D. 1874, your orator filed its bill against the State of Alabama, in the chancery court of Montgomery County, in said State, and that the suit commenced by said bill is still pending and undetermined.

2nd. And now by leave of said court duly had and obtained, your orator, by way of amendment to said bill, states that the Tennessee and Alabama Central Railroad Company within twelve months from the passage of an act of the general assembly of Alabama, entitled "An act to loan and appropriate the three per cent. fund and its interest," approved February 18th, 1860, did in good faith commence the grading of that part of their railroad which lies between the town of Decatur and the point on the Alabama and Tennessee Rivers Railroad, at or in the vicinity of Montevallo, at which the Tennessee and AlabamaCentral Railroad touched or was to touch the Alabama and Tennessee Rivers Railroad, and did within twelv

39 months from the passage of said act of Feb'y 18th, 1860, put to work in constructing or grading the portion above specified of said Tennessee and Alabama Central Railroad more than two hundred good and effective hands, with all necessary and proper equipments of tools, carts, and mules or horses for the number of hands so employed on said work.

Your orator further states that within seven years after the termination of the late war between the Confederate States and the United States, and certainly before the 15th day of September, A. D. 1872, the grading of the said railroad (which is now the railroad of your orator) between Decatur and Calera, mentioned and described in said bill, was completed and prepared for the superstructure; that said point or place now known as Calera was formerly known as Lime Station or Lime-Kiln, in Shelby County, and is the point of intersection of your orator's said railroad with the railroad formerly known as the Alabama and Tennessee Rivers Railroad, and now known as the Selma, Rome, and Dalton Railroad; that after December 30th, 1868, and on or before October 6th, 1869, your orator gave bond, to the satisfaction of the governor of the State of Alabama, for the faithful application to the construction of said railroad from said Lime Station, in Shelby County,

40 to Decatur, of the proceeds of bonds and obligations of the railroad companies mentioned in the account presented by your orator against the State of Alabama on the 6th day of October, A. D. 1869 (and which is hereinafter more fully and particularly set out), to each of which companies your orator erroneously believed loans had been made under said act of Feb'y 18th, 1860, whereas in fact the loan made to the Alabama and Mississippi Rivers Railroad Company was not made under said act.

3. Your orator further states that on the 6th day of October, A. D. 1869, your orator presented the following account against the State of Alabama on account of the three per cent. fund and its interest, and demanded of said State a settlement in accordance with said account.

The account thus presented by your orator was in words and figures following, to wit:

40 *The State of Alabama, in account current, the South and North Alabama Railroad Company.*

*Appropriations of the three per cent. fund and its interest.*

| 1869. | Dr. | | |
|---|---|---|---|
| October 6 | To am't three per cent. fund account, approved 18th February, 1860 | $663,135 00 | |
| | To interest from 1st January, '60, to date, 9 years, 9 months and six days | 388,597 10 | |
| | | | 1,051,732 10 |

| 41 1869. | Cr. | | |
|---|---|---|---|
| | By 8 semi-annual instalments of interest, received from July, '61, to January, '65, "per sec. 5 of act approved 18th Feb., 1860" | $134,154 00 | |
| October 6. | By Cahaba, Marian and Greensboro Railroad Company, balanc' account rendered to 18th August, '69, "per act December 30th, '68" | 31,950 00 | |
| | By interest from 18th August, '69, to date on $25,000, 49 days, at 6 per cent | 204 17 | |
| | By Alabama and Mississippi Rivers Railroad Co., balance account rendered to 18th Feb., '66, "per act Dec. 30th, '68" | 50,053 33 | |
| | By interest from 18th Feb., '66, to date on $40,000, 3 y'rs, 7 months, and 18 days, at 6 per cent | 8,720 00 | |
| | By Opelika and Oxford Railroad Co., balance account rendered to 21st July, '69, "per act Dec. 30th, '68" | 66,500 00 | |
| | By interest from 21st July, '69, to date on $50,000, 77 days, at 6 per cent | 641 66 | |
| | By Montgomery and Eufala R. R. Co., balance account rendered 17 May, '69, "per act Dec. 30, '68" | 36,745 00 | |
| 42 | By interest from 17th May, '69, to date on $30,000, 4 mo. and 19 days, at 6 per cent | 695 00 | |
| | By Northeast and Southwest R. R., balance account rendered 18th Feb'y, '68, "per act Dec. 30th, 1868" | 3064,68 00 | |
| | By interest from 18th Feb'y to date on $218,000, 19 mo. and 18 d'ys. at 6 per cent | 21,364 00 | |
| | By Wills Valley R. R. Co., balance account rendered to 30th Sept., '67, "per act Dec. 30th, '68" | 87,375 00 | |
| | By interest from 30 Sept., '67, to date on $75,000, 2 years and 7 days at 6 per cent | 9,087 50 | |
| | | | 753,957 66 |
| | To balance in favor South and North Ala. R. R. Co., Oct. 6th, '69 | | $297,774 44 |
| | (Interest and principal Oct. 6th, 1870, $315,643.90) | | |

Your orator further states that said account is incorrect in so far as it acknowledges any credit to the State of Alabama for securities turned over by said State to your orator on account of any loan or pretended loan to the Alabama and Mississippi Rivers Railroad Company; that in all other respects said account is substantially correct except
43 as stated and disclosed in this amendment; that said account was thus made out through ignorance of fact and mistake of fact as to said item as to the loan to the Alabama and Mississippi Rivers Railroad Company, caused by the representations of said State of Alabama and its governor, and on account of the trust, faith, and reliance and confidence which your orator placed in said State and the governor thereof, and in reliance upon the representations and acts of said State.

Your orator further states that said State of Alabama has never admitted the correctness of the account so presented, and that no act of said State or of its officers has ever been predicated upon or induced by the presentation of said account.

4. Your orator further states that no other bonds, mortgages, securities, deeds of trust, or other thing of value than those mentioned in said account, rendered by your orator against the State of Alabama on the 6th day of October, 1869, have ever been turned over by said governor or said State to your orator, or to the Mountain Railroad Contracting Company, or to the Tennessee and Alabama Central Railroad Company, although since the grading of said railroad of your orator from Decatur to Calera was completed and ready for the super-
44 structure, as aforesaid, and before and ever since 15th day of September, 1872, the Mountain Railroad Contracting Company, as well as your orator, has been ready and willing to execute, and has offered to execute, bond to the satisfaction of said governor for the faithful application to the construction of said railroad of your orator of all the proceeds of each and all of the bonds and obligations of the railroad companies respectively mentioned in said act of Feb. 18th, 1860, to which company or companies loans had been made, under said act of Feb. 18th, 1860. Neither your orator nor the Mountain Railroad Contracting Company, nor the Tennessee and Alabama Central Railroad Company, has ever been able to obtain from said governor, or said State, any other bonds or obligations of any of said railroad companies, mentioned in said act of February 18th, 1860, than those which are mentioned in said account presented by your orator against said State October 6th, 1869, or any other thing in lieu thereof, although prior to October 1st, 1872, there had been and was a full compliance, on the part of said three last-mentioned companies, with all the terms and conditions required of them, or either of them, by said act of Feb. 18th, 1860, except only those terms and conditions a compliance with which had been waived or dispensed with by the intervention of
45 the late war between the United States and the Confederate Sates, or by the acts of the legislature of said State, referred to in said original bill and this amendment, *and by the act of the legislature of said State referred to in said original bill and this amendment*, and by the act of the legislature of said State entitled "An act in relation to the three per cent. fund," approved July 30th, 1868, each and all of which acts are hereby referred to and made part hereof. Under this last-mentioned act of July 30th, 1868, no bond was ever given, and nothing was ever received by any of said three last-mentioned companies, and no settlement was ever made with any of the railroad companies therein referred to, and nothing whatever was done, or by any governor of said State, or with his sanction and approval. There never has been any law or authority for the turning over to your orator of said illegal and worthless bond, and obligation, and mortgages of said Alabama and Mississippi Rivers Railroad Company herein mentioned, and said turning over thereof to your orator neither injured or prejudiced said State, nor benefited your orator, nor could benefit your orator, because of its utter worthlessness to your orator.

5. Under ignorance of fact, as well as misapprehension of fact,
46 and of the rights of your orator, produced by the conduct of said governor, your orator took possession of said bond and mortgage of the Alabama and Mississippi Rivers Railroad Company for $40,000 (a credit for which was erroneously allowed said State in said account, presented October 6th, 1869), when the same were turned over, as above

mentioned, by him to your orator, your orator then erroneously believing that the last-mentioned bond and mortgage had been taken for a loan made under said act of Feb. 18th, 1860, and was not illegal or void, and but for said belief your orator would not even have taken possession thereof, or have had anything to do with the same, which, from their inception, have been and still are wholly worthless as well as illegal and void. The only authority, or color of authority, for the loan to the Alabama and Mississippi Rivers Railroad Company, for which the said bond, and obligation and mortgage of that company were given, was the said act of the legislature of Alabama, entitled "An act in relation to the Selma and Gulf Railroad Company," approved Dec. 5th, 1861, which said act was passed, and which said loan was made, without the knowledge or consent of your orator,
or of the Mountain Railroad Contracting Company, or of the
47 Tennessee and Alabama Central Railroad Company; and said
last-mentioned bond and obligation was imposed upon your orator as aforesaid, as a bond and obligation given for a loan under said act of February 18th, 1860, whilst your orator remained and was ignorant of the fact which is here now stated; that said last-mentioned bond and obligation were not given for a loan under said act of Feb. 18th, 1860, but were given for a loan under color of said act of December 5th, 1861, and were and are illegal and void and utterly worthless. It was not until after your orator had made the effort mentioned in said original bill to collect or enforce said last-mentioned bond and obligation that your orator's aforesaid ignorance and misapprehension in relation thereto ceased. Your orator has never realized any benefit from said last-mentioned bond and obligation, and never will be able to do so; and your orator here now offers to surrender, in such manner as your honor may direct, said last-mentioned bond and obligation, to be restored to the possession of the said State, and claims and states that said State of
Alabama is liable to your orator for the forty thousand dollars of
48 said three per cent. fund, and the interest thereon, which said act
of Feb'y 18th, 1860, authorized to be loaned to the Selma and Gulf Railroad Company, and which, instead of being so loaned, was loaned to the Alabama and Mississippi Rivers Railroad Company as aforesaid, under color of said act of December 5th, 1861, without the consent of your orator, or of the Mountain Railroad Contracting Company, or of the Tennessee and Alabama Central Railroad Company. No bond or obligation, or mortgage, or deed of trust of the Alabama and Tennessee Rivers Railroad Company, for the $225,000 of said three per cent. fund which was authorized by said act of Feb. 18th, 1860, to be loaned to that company, and which was loaned to that company under that act, has ever been turned over or offered to your orator, or to the Mountain Railroad Contracting Company, or to the Tennessee and Alabama Central Railroad Company, although each of these three last-mentioned companies has been ready and willing, before and ever since the grading of said railroad of your orator was completed as aforesaid, and is still
ready and willing, and here again offers to give any bond or other
49 instrument in relation thereto, which might be or was required
under the law of the land.

6. Your orator further states that at the Feb'y term, 1871, of the city court of Montgomery, the Selma and Gulf Railroad Company made its application to that court for a mandamus to compel the treasurer of the State of Alabama to pay to that company a warrant for the sum of forty thousand dollars, drawn in its favor in November, 1870, by the auditor of Alabama, or requisition of the governor; said application was denied

by said city court, and was then renewed in and granted by the supreme court of Alabama at its June term, 1871, upon the facts and circumstances set forth and disclosed in the report of said application, contained in the case reported in the 46th volume of Alabama Reports, as ex parte Selma and Gulf R'lr'd Co., on pages 423 to 431, both inclusive, and which is prayed to be taken as part hereof. Your orator was not a party or privy to, and had no notice of the proceedings last above referred to. In the said proceeding the waiver of the Selma and
50 Gulf R'lr'd Co., disclosed by the aforementioned act, "in relation to the Selma and Gulf Railroad Company," approved Dec. 5, 1861, was not mentioned by said Selma and Gulf Railroad Company, nor was the same set up or proved on behalf of the State of Alabama, the real party defendant to the proceeding—the treasurer, against whom the mandamus was asked and granted, having no other or personal interest in the matter than as the treasurer of the State of Alabama.

Your orator further states that the aforesaid act of Dec. 5th, 1861, is void, because of the purpose manifested on its face, to aid in the war then being carried on by the State of Alabama and the Confederate States of America against the United States of America. However, should your orator be mistaken in this, your orator states that under said act said sum of forty thousand dollars could not be loaned to said Selma and Gulf Railroad Company until said company should give bond with good security, conditioned in substance that the $40,000 should be used alone in paying for and laying down the iron upon said railroad; and further, upon the execution of a first-mortgage bond on said
51 railroad and all its rights and fixtures, to secure the repayment of said forty thousand dollars at the expiration of five years, and interest thereon at the rate of six per centum per annum.

Your orator states that although said Selma and Gulf Railroad Company obtained said sum of forty thousand dollars, under the aforesaid decision of the supreme court, that said Selma and Gulf Railroad Company was entitled to demand and receive the same upon complying with the terms prescribed by law. Yet said Selma and Gulf Railroad Company never executed any first mortgage bond "on its railroad and all its rights and fixtures," for the repayment of said loan and interest. On the contrary, your orator states that the State of Alabama, before the June term, 1871, of supreme court, permitted and allowed said Selma and Gulf Railroad Company to execute and issue a large amount of bonds, secured by first mortgage on the property, rights and franchises of the Selma and Gulf Railroad Company, for a sum amounting at the filing of the original bill in this cause, and ever since, to considerably more than the value of all the property, rights, and franchises of
52 the said Selma and Gulf Railroad Company; that the aforesaid first mortgage bonds were endorsed by the State of Alabama before the 1st day of June, A. D. 1871, and by virtue of laws passed by said State of Alabama, are entitled to a priority over any and all other claims against said Selma and Gulf Railroad Company, its property and franchises.

Your orator further states that said Selma and Gulf Railroad Company is insolvent; that it has for several years failed to pay any interest on its said first-mortgage bonds, and that upon a sale of the property, franchises, and rights of said Selma and Gulf R. R. Co., there would not be sufficient property or assets to satisfy said first-mortgage bonds, the claims or indebtedness secured by said first mortgage.

Your orator further states that the security taken by the State of Alabama, to secure said loan of forty thousand dollars, is utterly worth-

less, and is not such security as is or was authorized by said act of February, 1860, or by any law which is valid as against your orator, in the premises; and that by reason of the aforesaid doings and actings of the State of Alabama, said sum of forty thousand dollars and interest
53 has been utterly lost to your orator, and nothing whatever has been received on account thereof.

Your orator further states that upon a bill filed in the chancery court of Dallas, before the original bill was filed in this cause, by John W. Lapsley, trustee, &c., against said Selma and Gulf Railroad Company et al. (and which bill is still pending), an order was made by said court placing said railroad company in the hands of a receiver; that Samuel G. Jones was duly appointed and qualified as receiver, before the filing of the original bill in this cause, and as such now has charge and custody of the property and rights of said Selma and Gulf Railroad Company; that by decree of said court an injunction issued before the filing of the original bill in this cause, which is still of force, restraining and enjoining any and all persons whatsoever from suing in any manner said railroad company or said receiver.

Your orator further states that application has been duly made to said chancery court for leave to make said Selma and Gulf Railroad Company, or its receiver, a party to the bill filed in this cause, but that said chancery court overruled and refused said application, and would not permit said Selma and Gulf Railroad Company or said re-
54 ceiver to be made a party to the bill in this cause.

7th. Your orator further states that the Alabama and Tennessee Rivers Railroad Company, more than six years before the filing of the original bill in this cause, had been dissolved, or ceased to exist, by virtue of the proceedings and acts of the general assembly of Alabama hereinafter referred to; that under and by virtue of a contract of consolidation made on the 8th of August, 1866, between the Alabama and Tennessee Rivers Railroad Company, the Georgia and Alabama Railroad Company, and the Dalton and Jacksonville Railroad Company, the said Alabama and Tennessee Rivers Railroad Company became merged into and consolidated into a new corporation, which said consolidation was approved by an act of the general assembly of Alabama, entitled "An act approving the consolidation of the Dalton and Jacksonville Railroad Company with other companies therein named, and to authorize the consolidated company to adopt a name and charter and to act under the same," approved Feb. 8th, 1867, as well as by the acts of the legislature of the State of Georgia; that since said consolidation the new corporation, into which
55 said Alabama and Tennessee Rivers Railroad Company was merged, and has since been known and called the Selma, Rome and Dalton Railroad Company, which is a corporation existing under the laws of Alabama; that before the filing of the original bill in this cause, James B. Johnston and John A. Stewart, as trustees under a certain mortgage mentioned in this bill, did file a general creditor's bill in behalf of themselves and others against the Selma, Rome and Dalton Railroad Company, and all creditors of the same, praying for the appointment of a receiver, and an injunction against all persons, preventing them from suing said corporation or the receivers, or otherwise interfering with the same; that said bill was duly filed in the chancery court of Dallas County (which had jurisdiction of the case made by the bill), and that an injunction issued as prayed for; that Thomas A. Walker and John Tucker were duly appointed by said court receivers of the property of said corporation, and now have custody and

charge of the same; that said injunction was issued, and said
56 receivers appointed before the filing of the original bill in this cause; that your orator duly applied to said chancery court of Dallas for leave to make said Selma, Rome and Dalton Railroad Company party defendant to this bill, or to make the receivers thereof parties defendant; but said chancery court overruled and refused said application, and refused to permit either to be made parties to the original or amended bill filed in this cause.

8th. Your orator states that the State of Alabama, by various acts of its legislature passed in and since the year 1868, has uniformly recognized and treated your orator as the beneficiary and equitable owner of the three per cent. fund which was authorized to be loaned by the second section of said act of Feb'y 18th, 1860.

9th. Your orator further states, upon information and belief, that under the act of the general assembly of Alabama entitled "An act to authorize the governor to endorse the bonds of the Montgomery and Eufaula Railroad Company, under the act of Feb'y 19th, 1867, and its amendments, approved December 30th, 1868 (which last-mentioned
57 act of December 30th, 1868, is here referred to as part of this amendment, and hereby made part hereof), the governor of Alabama, before Oct. 6th, 1869, did endorse the first-mortgage bonds of the said Montgomery and Eufaula Railroad Company, to the extent and for not less than twelve hundred thousand dollars of principal, besides the interest thereon; that the length of the railroad of the Montgomery and Eufaula Railroad Company within the State is about eighty (80) miles, its termini being the city of Montgomery and the city of Eufaula, in said State; that the amount of the first-mortgage bonds of said last-mentioned company, endorsed by the governor of Alabama under and by virtue of said last-mentioned act, December 30th, 1868, was not less than $1,200,000.00, and is greater than the value of all the property and franchises of said last-mentioned company, and is outstanding and unpaid, as well as eight per cent. per annum interest thereon; that but for the passage of said last-mentioned act of December 30th, 1868, and the said endorsement of said first-mortgage bonds thereunder by the governor of Alabama, the bond and mortgage executed by said last-mentioned company, and approved by said governor in 1860 for
58 thirty thousand dollars of said three per cent. fund, then loaned to that company under and in pursuance of the provisions of said act of Feb'y 18th, 1860, would undoubtedly have continued and remained the first and paramount lien on all the property and franchises of the Montgomery and Eufaula Railroad Company, and could and would have been enforced and collected, with the interest thereon, by your orator before the filing of said original bill of your orator; that on the 6th day of October, A. D. 1869, said last-mentioned bond and mortgage were turned over by the governor of Alabama to your orator, and in consideration of that turning over, and without any other consideration, the State of Alabama was credited in said account of October 6th, 1869, with $36,745.00 and with $695.00, these two credits then being the estimated amount due for principle and interest for said last-mentioned bond and mortgage. When said last-mentioned bond and mortgage were turned over to your orator as aforesaid, and said credits therefor were entered in said account, as well as for a long time thereafter, your orator was ignorant and had no notice that the governor of
59 Alabama had endorsed said first mortgage bonds, under said last-mentioned act of December 30th, 1868, or any of such bonds; and but for this ignorance and want of notice, your orator would not have

received possession of said bond and mortgage of the Montgomery and Eufaula Railroad Company, or entered said credits therefor. After your orator had received possession of said last-mentioned bond and mortgage, and had entered said credits therefor, your orator was informed, and here avers it to be true, that Samuel A. Strang had in May, 1872, filed his bill in the district court of the United States for the middle district of Alabama, against the Montgomery and Eufaula Railroad Company et al., alleging (among other things) that said first-mortgage bonds, bearing eight per cent. per annum interest, to the extent of twelve hundred thousand dollars, endorsed by the governor of Alabama, under said last-mentioned act of December 30th, 1868, were the only first-mortgage bonds, and constituted and were entitled to a first lien superior to all other liens upon all the property and franchises of the Montgomery and Eufaula Railroad Company, and that this last-mentioned com-
60 pany was insolvent, and praying for the appointment of a receiver of all the property of said last-mentioned company, and for an injunction restraining all persons from suing said last-mentioned company, or interfering with said receiver. By decree of said district court of the United States, in said bill filed as aforesaid by Sam'l A. Strang, one A. J. Lane was appointed receiver of all the property of said Montgomery and Eufaula Railroad Company some time in the month of May or June, A. D. 1872, and has ever since had charge and custody and control of all the property and franchises of said Montgomery and Eufaula Railroad Company. Immediately upon the filing of said bill by said Strang, an injunction issued out of said district court of the United States for the middle district of Alabama, restraining and enjoining all persons whatsoever from suing said Montgomery and Eufaula Railroad Company, or its receiver, either in law or in equity, or in any way in-
terfering with said railroad company or its receiver, which said
61 injunction is still of force and undissolved. Afterwards (under the provisions of an act of Congress of March, 1873), said suit was transferred to the circuit court of the United States at Mobile, in which court it is still pending and undetermined. Your orator on the day of , 1874, after much opposition on the part of said complainants in said bill of said Sam'l A. Strang obtained leave from said circuit court of the United States to become a party defendant to said bill, and to file a cross-bill to set up and enforce your orator's rights growing out of said bond and mortgage of the Montgomery and Eufaula Railroad Company against the said Montgomery and Eufaula Railroad Company, its franchises and property, as a first and paramount lien, over all other liens on said Montgomery and Eufaula Railroad Company's property, franchises, and rights. Your orator thereupon filed an answer, and also his said cross-bill, praying to have said bond and mortgage of said Montgomery and Eufaula Railroad Company executed as
aforesaid to secure said loan of $30,000.00 declared a first
62 and paramount lien over all other liens whatever upon the property, franchises, and rights of said Montgomery and Eufaula Railroad Company, and to have the same sold for its satisfaction, and said bill of said Strang and your orator's cross-bill are still pending in said circuit court of the United States at Mobile. While your orator has thus taken all the steps in its power to enforce its said claim against the Montgomery and Eufaula Railroad Company, and will continue to use all means known to law to enforce the same, and thereby save the State of Alabama from any loss on that account, yet your orator on the account of the facts in regard to said bond and mortgage of said Montgomery and Eufaula Railroad Company (hereinabove in the 9th para-

graph of this amendment fully set forth and disclosed), is willing to rely solely upon the enforcement of said claim against the Montgomery and Eufaula Railroad Company, and its satisfaction out of the property and franchises of said last-mentioned company. Your orator avers and states that if the collection of said bond and mortgage for thirty thousand dollars and interest, against the Montgomery and Eufaula Railroad
63 company is defeated, it will be due solely to the acts of said State of Alabama and its governor, in allowing said Montgomery and Eufaula Railroad Company to encumber its property, rights, and franchises with liens paramount to that of the bond and mortgage turned over to your orator, as aforesaid, without any fault on the part of your orator. Your orator does not admit that any of the liens upon the property, franchises, and rights of said Montgomery and Eufaula Railroad Company are equal, or superior, to the lien of your orator, growing out of the said turning over of said bond and mortgage given by said Montgomery and Eufaula Railroad Company to secure said loan of $30,000.00 of said three per cent. fund, but avers and states that if it fail in its efforts to collect the same, it will only be by reason of its being held by the courts; that the State of Alabama has suffered and authorized said Montgomery and Eufaula Railroad Company to encumber its property and franchises with liens superior to that of your orator. Your orator avers and states that the prosecution by it of its said
64 cross-bill against said Strang and the Montgomery and Eufaula Railroad Company is in no way inconsistent with the claims set up by your orator in his original and this amended bill, but is in fact beneficial to the State of Alabama. Your orator is willing to credit the State of Alabama with whatever sums may be recovered on account of said bond and mortgage of the Montgomery and Eufaula Railroad Company, but not being in any fault in regard to the same is unwilling, if it should be defeated in said collection, to release the State of Alabama from your orator's rightful claims and demand in that behalf.

If, however, your honor's court should deem the prosecution of said cross-bill inconsistent with the claims herein set up and sought to be enforced, then your orator is willing to make such election in the matter of said bond and mortgage of the Montgomery and Eufaula Railroad Company as to your honor may seem meet. Your orator prays that the State of Alabama be made and treated as a party defendant to this amendment of your orator's said original bill, and that summons issue to said State of Alabama requiring the said defendant to answer the same, and that on the final hearing of this cause your honor will grant unto your orator the relief prayed in said original bill, and
65 also such other and further and general relief as to equity belongs or to your honor may seem meet.

RICE, JONES & WILEY,
*Sol's for Complainant.*

NOTE:—The defendant is required to answer each allegation and paragraph of this amendment, numbered from one to nine, both inclusive.

RICE, JONES & WILEY,
*Sol. for Complainant.*

Filed in office December 21st, 1874.

JOHN W. HUGHES,
*Register.*

66 To any sheriff of the State, greeting:

You are hereby commanded to summon the State of Alabama to appear and plead to, or answer within thirty days from the service hereof, the amended bill of complainant, filed in the chancery court for the second district of the southern chancery division at Montgomery, against the State of Alabama by the South and North Alabama Railroad Company. You must serve a copy of said amended bill upon the governor of Alabama, his excellency George S. Houston, at the time you serve this summons upon him as such governor.

Witness the hand of the register and the seal of said chancery court this the 6th day of January, A. D. 1875.

JOHN W. HUGHES,
*Register, &c.*

Received in office sixth day of January, 1875.

JOHN N. MURPHY,
*Sheriff.*

Executed by serving upon and delivering to the governor of Alabama, his excellency George S. Houston, a copy of the within summons, and a correct copy of the amended bill mentioned in the within summons.

Jan'y sixth, 1875.

JOHN N. MURPHY,
*Sheriff.*

67 In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA.

At rules before the register this Monday the first day of March, 1875. In this cause it being made to appear to the register that a summons requiring the defendant, the State of Alabama, to appear and plead to, or answer the amended bill of complainant in this cause, within thirty days from the service upon it, was served upon it by the sheriff of Montgomery County, Alabama, on the 6th day of January, 1875, by serving upon and delivering to the governor of Alabama, his excellency George S. Houston, a copy of the summons, and a correct copy of the amended bill mentioned in the said summons, and the said defendant having failed to plead to, answer or demur to the said amended bill to the date hereof, it is now, therefore, on motion of defendant's solicitors, ordered and decreed that the said amended bill of complaint in this cause, be and it is hereby in all things taken as confessed against the said the State of Alabama aforesaid.

J. W. HUGHES,
*Register.*

68 In chancery at Montgomery.

SOUTH AND NORTH ALABAMA RAILROAD COMpany
*vs.*
THE STATE OF ALABAMA. } No. 952.

Motion is made by the defendant to dismiss the above stated case, and to strike it from the docket, on the grounds that there is no law

which authorizes suits to be brought or prosecuted against the State of Alabama, and that this suit cannot be further maintained, because the law which may have authorized its institution has been repealed.

JOHN W. A. SANFORD,
*For the Motion.*

Filed in open court May 11th, 1875.

V. M. ELMORE,
*Register.*

MAY 11TH, 1875.

Court met pursuant to adjournment.

Respondent moves to dismiss this suit, and files his motion in writing. Ordered to lie over one day.

*Decree dismissing bill.*

MAY 17TH, 1875.

69 THE SOUTH & NORTH ALABAMA RAILroad Company
*vs.*
THE STATE OF ALABAMA. } 952.

This cause comes on to be heard upon a motion by respondent to strike the cause from the docket, because there is no law which authorizes suits to be brought or prosecuted against the State of Alabama, and that this suit cannot be further maintained because the law which may have authorized its institution has been repealed. This motion is made under a recent act of the legislature of Alabama, declaring that the State shall not be sued in her courts. The complainant resists the motion upon two grounds: first, because he says that as to the two per cent. fund, the subject of this litigation, the State of Alabama has never been a sovereign, or clothed with the immunities of a sovereign, because the circumstances under which she became possessed of that fund made her a trustee, and that complainant is a cestui que trust, and therefore respondent is not exempt from suit by reason of the act of the legislature declaring that the State shall not be sued; and second, because as to the two per cent. fund, the State had entered into a contract, by accepting the terms of the act of Congress admitting her as a State,
70 by which she agreed never through her legislature or otherwise to assist or claim exemption as a sovereign State, &c., and therefore, if the act under which the motion is made is applicable to this case, it is unconstitutional for impairing her contract.

The able argument and brief of complainants' solicitors raised doubts in the minds of the court at first as to whether the State was relieved of liability to be sued in this case by reason of the act under which the motion to dismiss is made, but upon consideration and consultation of the authorities, the court, for reasons it deems unnecessary to elaborate, is of the opinion that she is exempt from such liability, and that the motion should be sustained, and therefore orders and decrees that the motion to dismiss the bill in this cause be and is hereby sustained, and the bill is dismissed. It is further ordered and decreed that complainant pay the costs of this case, to be taxed by the register, for which execution may issue.

H. ANSTILL,
*Chancellor.*

MAY 14*th*, 1875.

71 In chancery at Montgomery.

THE SOUTH & NORTH ALABAMA R. R. CO.
*vs.*
THE STATE OF ALABAMA.

To the State of Alabama or its attorney-general, John W. A. Sanford, greeting:

Whereas the South and North Alabama Railroad Company has taken an appeal from the decree rendered by the chancery court for the second district of the southern chancery division of the State of Alabama, in the cause wherein the South and North Alabama Railroad Company is complainant and the State of Alabama is defendant.

Now, therefore, you are hereby cited to appear at the June term, A. D. 1875, of the supreme court to defend on said appeal if you shall think proper so to do.

Witness my hand this 19th day of May, 1875.

V. M. ELMORE,
*Register.*

Filed in office May 19th, 1875.

V. M. ELMORE,
*Register.*

Service accepted May 19th, 1875.

JOHN W. A. SANFORD,
*Att'y-General.*

72 In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA.

In this cause the complainant prays an appeal to the next ensuing term of the supreme court of Alabama, from the decree rendered in this cause dismissing complainant's bill and taxing it with costs.

May 18th, 1875.

RICE, JONES, & WILEY,
*Sol's for Compl'ts.*

In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD
*vs.*
THE STATE OF ALABAMA.

We acknowledge ourselves as complainant's security for costs of the appeal this day prayed to the supreme court from the decree rendered in this cause at the present term.

May 18th, 1875.

RICE, JONES & WILEY
I. W. SLOSS.

Approved May 18th, 1875.

V. M. ELMORE,
*Register in Chancery.*

Filed in office May 18th, 1875.

V. M. ELMORE,
*Register.*

73 THE SOUTH & NORTH ALABAMA R. R. Co.
*vs.*
THE STATE OF ALABAMA.

Upon consideration, it is ordered and decreed that the decree heretofore made in this cause dismissing the bill, be and is hereby amended, so as to strike out the words "two per cent." and insert in lieu thereof the words "three per cent."

May 29th, 1875.

H. AUSTILL,
*Chancellor.*

In chancery at Montgomery.

THE SOUTH AND NORTH ALABAMA RAILROAD Company.
*vs.*
THE STATE OF ALABAMA.

I, Vincent M. Elmore, register in chancery for the second district (composed of the county of Montgomery) of the southern chancery division of the State of Alabama, do hereby certify that the complainant, the South and North Alabama Railroad Company, in the cause of the South and North Alabama Railroad Company against the State of Alabama, in said court of chancery, has taken an appeal from
74 the decree in said cause to the supreme court, and I further certify that said appeal was taken on the 18th day of May, 1875.

Witness my hand this the 7th day of June, 1875.

VINCENT M. ELMORE,
*Register, &c.*

In chancery at Montgomery.

THE STATE OF ALABAMA,
*Montgomery County:*

I, Vincent M. Elmore, register in chancery for the second district (composed of the county of Montgomery) of the southern chancery division of the State of Alabama, do hereby certify that the foregoing pages, numbered from one to inclusive, contain a full, true, and complete transcript of the record, orders and decrees made and filed in said chancery court, in a certain cause therein pending, wherein the South and North Alabama Railroad Company is complainant and the State of Alabama is defendant, as the same appear of record and on file in said court.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed this the 7th day of June, A. D. 1875.

[SEAL.] VINCENT M. ELMORE,
*Register, &c.*

[$1 State tax on seals, canceled.]

75 Supreme court, December term, 1875.

THE SOUTH & NORTH ALABAMA RAILROAD COMPANY
*vs.*
THE STATE OF ALABAMA.

Now, at this term comes the appellant, by its solicitors, and says that

manifest error hath intervened in the proceedings in the court below to its great injury, and assigns as error—

1st. The court erred in dismissing the bill on the motion of the attorney-general.

2nd. The court erred in not overruling the motion to dismiss.

3rd. The court also erred in holding that any statute law was necessary to authorize complainant to maintain this suit.

4th. The statute forbidding suits against the State has no application to this cause, and the court erred in holding that it did.

5th. The act of the legislature approved Dec. 18th, 1875, "to repeal sections 2534, 2536, 2571, and 3323 of the Revised Code," is unconstitutional and void, as impairing the "obligation of contracts," and afforded no authority for entertaining or granting the motion to dismiss, and the court below erred in holding that it authorized the dismissal.

6th. The said act deprives appellant of all remedy whatever for
76 the enforcement of its contract, and is violative of the Constitution of the United States in that it impairs the obligation of the contracts under which appellant's rights arise, as disclosed by the pleadings of complainant in the record.

6th. The dismissal was a decision against the right or title claimed by appellant under the Constitution of the United States, which right or title was well founded, and was therefore erroneous.

7th. The dismissal was a decision against the right or title claimed by the appellant under the act of the Congress of the United States, which right or title is well founded, and was therefore erroneous.

8th. The court below erred in the final decree rendered.

9th. The court below erred in taxing the appellant with the costs of the suit, it having been brought under a law authorizing it, no trial being had on the merits, and complainant not being at any fault.

10th. The act of the general assembly last above referred to, if applied to this cause, is virtually a judgment rendered by the trustee against the cestui que trust in a cause pending between them, and is therefore void, and the court below erred in holding that it authorized the dismissal of this suit.

RICE, JONES & WILEY,
*Sol's for Appellant.*

There is no error in the record.

JOHN W. A. SANFORD,
*Att'y-Gen'l.*

77 Filed June 10th, 1875.

T. J. RULLEDGE, *Clerk.*

April 13th, 1876.—Argued and submitted.

T. J. RUTLEDGE, *Clerk.*

And on the 26th day of April, 1876, the following opinion and judgment were rendered in said cause, to wit:

*Opinion.*

Supreme court, December term, 1875, 3rd division, No. 353. Appeal from the chancery court of Montgomery.

THE SOUTH & NORTH ALABAMA RAILROAD Company
*vs.*
THE STATE OF ALABAMA.

MANNING, *J.*

The appeal in this cause is from an order of the chancellor dismissing

appellant's bill on the ground that the court could not entertain jurisdiction of a cause against the State after enactment of the statute No. 200, approved December 18th, 1874, to repeal sections 2534, 2536, and others of the Revised Code, and repealing "all laws and parts of laws * * * * * which make any provision for bringing or conducting suits against the State." This act was considered by us in ex parte the State of Alabama (January term, 1875), in which we held that it operated to prevent the prosecution of a cause then pending in the circuit
78 court of Montgomery County against the State, and required a dismissal of it by the court.

On behalf of appellant it is insisted that this decision in that case does not control in this, because, as contended, Alabama is not sued in this cause as a sovereign State, but as a mere corporation; that as such she took upon herself the performance of a trust in respect to a fund known as "the 3 % fund," of which complainant is the beneficiary; that this trust was assumed by the convention which formed the constitution of the State in its acceptance of certain proposals made to it by the act of Congress of March 2, 1819, "to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union upon an equal footing with the original States," and that the effect of the agreement thus made, and of the operation thereon of that clause of the Constitution which forbids a State from passing any law "impairing the obligation of contracts," was quo ad hoc to prevent Alabama from becoming a State, and to subject her to suit and judgment as a common corporation for a violation of duty toward this appellant. The proposals referred to, and which were agreed to by the convention, are contained in section six of said act of Congress, wherein it is in effect declared that in consideration,
79 among other things, that the said convention of the people of Alabama "shall provide by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said Territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said Territory; and that the same shall be at the sole and entire disposition of the United States; * * * * * and that the lands belonging to the citizens of the United States residing without the said State shall never be taxed higher than the lands belonging to persons residing therein; and that no tax shall be imposed on lands the property of the United States, and that all navigable waters within the said State shall forever remain public highways free to the citizens of said State and of the United States," &c.; then the following propositions "if accepted by the convention shall be obligatory upon the United States: * * * * * * * Third, that five per cent. of the net proceeds of the lands lying within the said Territory and which shall be sold by Congress from and after the first day of September in the year 1819, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which three-fifths shall be applied to those objects within the said State under
80 the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress."

The three-fifths above mentioned constitute what is known as the three per cent. fund, and is referred to as such in this cause. It was a concession by the United States to the State of Alabama of so much of the proceeds of the sales of the public lands in this State, to be employed for the benefit of the people of Alabama, in the making and improve-

ment of ways within her territory, and by her legislature as the legislature of a sovereign State, under a moral obligation, perhaps, but without any legal responsibility on account thereof, to the United States, or any person whatsoever. The transaction, and the obligations it created, no more degrade Alabama from the rank of a sovereign, than the acceptance by the United States from Great Britain of the indemnity paid by the latter under the recent treaty of Washington and arbitration at Geneva for the depredations done by the war-ships of the late Confederate States, and known as "the Alabama claims," divests the United States of sovereignty, and makes the country suable as a mere trustee, in its own courts against its consent, by the individuals who were
81 suffer's by the exploits of the ship Alabama and her kin and cruisers in that unhappy war.

Courts that were created by and derive their authority from the State of Alabama are not at liberty to entertain the idea that she is in political right and dignity the inferior of any other in the sisterhood of States. She was invited into and entered the Union according to the express language of the act referred to, and of the joint resolution of the Congress of the United States, approved December 14th, 1819, "on an equal footing with the original States in all respects whatsoever." (3 U. S. Statutes at Large, 489-90 and 608.)

We have not turned aside from the consideration of the only question presented by the order appealed from to examine the bill and inquire whether or not by the acts of the legislature of Alabama, professing to make loans of the three per cent. fund, appellant has the right it claims therein. Having no power to render a decree against the State. the chancellor properly repudiated the cause; and his order dismissing it is affirmed, with costs.

STONE, J., not sitting.

*Judgment.*

SUPREME COURT,
*Saturday, April 29th*, 1876.

Court met pursuant to adjournment.
Present and presiding as judges,
Hon. R. C. Brickell, chief justice.
" A. R. Manning, associate justice.
" G. W. Stone, " "

82 THE SOUTH & NORTH ALABAMA RAILroad Company
*vs.*
THE STATE OF ALABAMA. } 3rd Div. No. 353.

Come the parties by their attorneys, and the record and matters therein assigned as error being argued and submitted on briefs, and duly examined and considered by the court, it is adjudged that in the records and proceedings of said chancery court there is no error. It is thereupon considered that the decree of said chancery court be in all things affirmed. It is also considered that said appellant, the South and North Alabama Railroad Company, and Rice, Jones & Wiley, and J. W. Sloss, sureties on appeal bond, pay the costs of said appeal in this court and in the court below.

And on the 25th day of May, 1876, the following writ of error, bond and citation were filed in the office of the clerk of the supreme court of Alabama, to wit:

*Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of Alabama, now holding and presiding in said supreme court, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of Alabama,
83 be fore you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between The South and North Alabama Railroad Company and the State of Alabama, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; and wherein, also, a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of, or commission held, or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission, or authority, and a judgment rendered by said supreme court, not only against said The South and North Alabama Railroad Company but also against Rice, Jones & Wiley, and J. W. Sloss, his sureties on appeal bond, whereby it was considered that the judgment and decree of the chancery court of Montgomery County against the said The South and North Alabama Railroad Company, which is referred to in the said judgment of said supreme court, be in all things affirmed, and the said The South and North Alabama Railroad Company, and his said sureties on appeal bond, pay the costs of said appeal in said supreme court, and in said chan-
84 cery court, a manifest error hath happened to the great damage of the said The South and North Alabama Railroad Company and Rice, Jones, and Wiley, and J. W. Sloss, severally as well as jointly, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court aforesaid, the first day of May, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

J. W. DIMMICK,
*Clerk of the Circuit Court of the United States for the Middle District of Alabama.*

85 Allowed by—
[SEAL.]

ROBERT C. BRICKELL,
*Chief Justice, Sup Ct. of Alabama.*

MAY 25TH, 1876.

Filed in office of clerk of the supreme court of Alabama, May 25th, 1876.

T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

*Bond.*

THE UNITED STATES OF AMERICA:
THE SOUTH AND NORTH ALABAMA RAILROAD Company, plaintiffs in error,
*vs.*
THE STATE OF ALABAMA, DEFENDANT IN ERROR.

Know all men by these presents that we The South and North Alabama Railroad Company, Rice, Jones & Wiley, J. W. Sloss, and H. M. Bush are firmly held and bound unto the State of Alabama in the full and just sum of five hundred dollars, to be paid to the said The State of Alabama, its certain attorney or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our
86 seals, and dated this 25th day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately and within the last sixty days, at a term of the supreme court of Alabama (which term is still continuing), in a suit depending in said court between The South and North Alabama Railroad Company and the State of Alabama a judgment was rendered by said supreme court against the said The South and North Alabama Railroad Company and Rice, Jones and Wiley and J. W. Sloss, their sureties on appeal bond, whereby it was considered that the judgment and decree of the chancery court of Montgomery County against the said The South and North Alabama Railroad Company, which is referred to in the said judgment of said supreme court, be in all things affirmed, and that the said The South and North Alabama Railroad Company and said sureties on appeal bond pay the costs of said appeal in said supreme court and in said chancery court, and the said South and North Alabama Railroad Company and the said Rice, Jones & Wiley and J. W. Sloss, severally as well as jointly, having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court, to reverse the said judgment of said supreme court in the aforesaid
87 suit, and a citation directed to the said The State of Alabama, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said The South and North Alabama Railroad Company, Rice, Jones & Wiley and J. W. Sloss shall prosecute the said writ of error to effect, and answer all damages and costs, if they fail to make their said plea good, then the above obligation to be void, else to remain in full force and virtue.

SOUTH AND NORTH ALABAMA RAILROAD COMPANY, [SEAL.]
By J. W. SLOSS, *President.*
J. W. SLOSS. [SEAL.]
RICE, JONES & WILEY. [SEAL.]
HENRY M. BUSH. [SEAL.]

Attest:

[COMPANY'S SEAL.] H. M. BUSH, *Sec'y.*

Approved May 25th, 1876.

ROB'T C. BRICKELL,
*Chief Justice Sup. C't of Alabama.*

Filed in the office of clerk of the supreme court of Alabama this May 25th, 1876.

T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

88 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the State of Alabama and John W. A. Sanford, attorney-general of said State, and its attorney of record in the cause hereinafter mentioned, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein the South and North Alabama Railroad Company, Rice, Jones & Wiley, and J. W. Sloss severally, as well as jointly, are plaintiffs in error, and you, the State of Alabama, are defendant in error, to show cause, if any there be, why the judgment rendered against the said The South and North Alabama, Rice, Jones and Wiley, and J. W. Sloss, who are jointly, as well as severally, plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Robert C. Brickell, chief justice of the supreme court of Alabama, this first day of May, in the year of our Lord
89 one thousand eight hundred and seventy-six.

ROB'T C. BRICKELL,
*Chief Justice of the Supreme Court of Alabama.*

Filed in office clerk supreme court of Alabama this 25th day of May, 1876.

T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

Service accepted.

JOHN W. A. SANFORD,
*Att'y Gen'l of the State of Alabama.*

JUNE 2ND, 1876.

STATE OF ALABAMA,
*Office Clerk Supreme Court:*

I, T. J. Rutledge, clerk of the supreme court of Alabama, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the record, and of all proceedings in the cause of The South and North Alabama Railroad Company vs. The State of Alabama, lately pending in said supreme court, together with the original writ of error and citation hereto attached, sued out and issued
90 in said cause in accordance with the act of Congress, approved February 5th, 1867, entitled "An act to amend an act to establish the judicial courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine, as the same appear of record and on file in my office as such clerk. I further certify that

the sum of one hundred and twenty-one and $\frac{70}{100}$ dollars, costs of said cause and of this transcript, was paid by said plaintiff in error.

Witness T. J. Rutledge, clerk of the supreme court of Alabama, and the seal thereof, at Montgomery, the 10th day of August, A. D. 1876.

[SEAL.] T. J. RUTLEDGE,
*Clerk Supreme Court of Alabama.*

[$1 State tax on seals, canceled.]

(Indorsement on cover:) No. 139. The South and North Alabama Railroad Company, plaintiff in error, vs. The State of Alabama. Alabama sup. court. Filed 25th August, 1876.

PHILADELPHIA
BAR
ASSOCIATION

IN THE

# Supreme Court of the United States.

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THE SOUTH AND NORTH ALABAMA RAILROAD CO.
*vs.*
THE STATE OF ALABAMA. } No. 22.

## REPLY OF PLAINTIFF IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

1. The jurisdiction of this court is plain.

On the very "face of the record" the following questions arise, and they cannot be avoided or gotten rid of, except by an adverse decision: Had plaintiff in error a contract with the State? Has the obligation of that contract been impaired? Had the plaintiff in error a right, title or privilege, under an act of Congress, or an authority exercised under the United States? If such right or title existed, has effect been denied to it?

The judgment of the State court inevitably determined these matters adversely to the plaintiff in error. That judgment could not have been rendered without deciding either that there was no contract, or conceding that there was, that it had not been impaired; and also, either that the right claimed did not exist or arise under the Constitution or an act of Congress; or, if it did, that the State legislation which the State court sustained, did not deny full effect to such act of Congress, or contravene the Constitution of the United States.

Murdock *vs.* Memphis, 20 Wallace, 590.
Stewart *vs.* Kahn, 11 Wallace, 493.

The case of Smith *vs.* Adsit, 16 Wallace, 185, is entirely unlike this. The Illinois Supreme Court merely decided,

upon general principles, governing courts of equity, and upon the state of facts shown by the record in that case, that the remedy of Smith against Adsit was in a court of law and not in a court of equity. The Alabama court in the present case, virtually decided that *all* jurisdiction existing when this suit was commenced, had been taken away after the suit was brought from *all* courts, as to the present and all other suits *against the State* of Alabama. The Illinois decision was that the party was not entitled to a *remedy* in a *particular* court, but that he did have an adequate remedy in other courts. The Alabama decision was in effect that the party was entitled to *no remedy* whatever *in any court.* In the Illinois case, the question whether the contract existed or had been impaired, was not necessary to the decision made, and not involved in it. In the present case there was no way to avoid the question, and the decision made by the highest court of Alabama, necessarily determined either that was no contract, or if it existed, that the enforcement of the State law did not impair its "obligation." Either point involved and decided, gives jurisdiction to this court.

2. The right or title here asserted, is plainly derived *from the act of Congress.* The State was but a *conduit* of title and its statute but an appointment entitling the appointee and his lawful assigns, of whom plaintiff in error is the last and exclusive one, to the bounty of Congress. *The act of Congress* did not give *any interest in that fund* to the State, but created and imposed the *duty* on the State to "*apply*" the fund to the making of roads under the direction of its legislature. The power of *direction* or *appointment* has been exercised in favor of plaintiff in error, as shown in the record. But *the actual application* of the fund has not been made by the State. The right plaintiff in error seeks to enforce is to compel the *application* of the fund to the purpose to which the act of Congress devoted it. The act of Congress, and its acceptance by the State, creating the *duty* and specifying the purposes to which the fund shall be *applied* under the

direction of the State legislature, and the legislature having made that direction, the right of the plaintiff in error to have the act of Congress construed, so far as it affects the right of plaintiff in error to sue, and the other rights asserted by it, cannot be taken away by the fact that the plaintiff in error must exhibit, as part of his chain of title, a State statute, executing the power of direction or appointment, under, and in conformity to the act of Congress. The appointee takes as though named in the instrument creating the power of appointment.

Smith *vs.* Garey, 2 Dev. and Battle, Eq., 48–49.

In the People *vs.* Railroad Co., 12 Wallace, 455, cited by defendant, the act of Congress created no rights and imposed no duties. It merely assented to an agreement between two States, and the questions sought to be raised in this court in that case, involved a construction of that agreement, and not of the act of Congress.

Whether or not the "liability of the State under its own statute," is incidentally or primarily involved, the effect of such State statute when measured by the act of 1819, and the Constitution of the United States, very clearly presents a federal question.

3. Neither the eleventh amendment, nor any of the authorities cited by the distinguished counsel for the defendant, militate in any way against the exercise of jurisdiction by this court in the present case.

The general proposition that "a sovereign, independent State," such for example as the United States, is not suable, except by its own consent, is not controverted. "But its consent is not requisite in each particular case. *It may be given in a general law*; and, if a State has surrendered any portion of its sovereignty, the *question whether a liability to suit be a part of this portion, depends upon the instrument by which the surrender is made.* If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, *then it has parted with this sovereign right of judging in*

*every case on the justice of its own pretensions*, and has entrusted that power to a tribunal in whose impartiality it confides."

Cohens *vs.* Virginia, 6 Wheaton, p. 380.

Again: "The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the *courts of the Union*. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. * * * It was not intended "to strip the Government of the United States of the means of protecting, by the instrumentality of the courts, the Constitution and laws from *active violation*."

6 Wheaton, 407.

The judicial power is not "to extend to any suit in law or equity commenced or prosecuted *against one* of the United States by citizens of *another State*, or by citizens or subjects of *a foreign power*." This is not a suit prosecuted by a citizen of *another* State or of a *foreign* power. "*It is not then within the amendment*, but is governed by the Constitution *as originally framed;* and we have already seen that in its origin the judicial power was extended to all cases arising under the Constitution or laws of the United States, without respect to parties."

Ib., 412.

Full force and effect are given to the eleventh amendment when each State is left free to determine *in the first instance* whether or not, and by whom, it could be sued in its own courts. But that amendment was not intended, and did not assume to abrogate other provisions of the same instrument, which might bear upon or determine the nature of the rights flowing from the State's consent to suit, after such consent *has been acted on.*

The consent having been given by law, and *having been acted on*, the *withdrawal* of that right and the dismissal of the suit at the instance of the State, leaving no remedy, is an

"*active violation*" by a State of the Constitution of the United States, which this court has always redressed by the exercise of its revisory or appellate jurisdiction.

"A case in law or equity * * may truly be said to ~~truly~~ arise under the Constitution, or a law of the United States, whenever its *correct decision* depends on the construction of either."

6 Wheaton, 379.

The jurisdiction of this court is by the letter of the Constitution extended to all such cases as the present.

6 Wheaton, 379–80.
See also, 6 Wheaton, 131, 134.
8 Wheaton, 323, 324.
7 Wheaton, 164.
Cooper *vs.* Roberts, 18 Howard, 173.

In the case last above cited, Cooper *vs.* Roberts, the act of Congress and compact upon which Michigan was admitted into the Union, were considered. That act and compact created trusts somewhat like the trusts created by the aforesaid act of Congress and compact of 1819; but with these striking differences in favor of the present plaintiff in error, as to the three per cent. fund here claimed; to wit: that this fund was never "granted *to the State* directly," nor "without limitation of its power."

4. Controlling questions in this case are whether plaintiff in error had a vested right or a contract with the State, which have been impaired by the States, and whether there was a legal remedy and right of suit against it, which have been virtually abrogated. These are *federal* questions. When the case is brought here, this court must determine for itself the existence as well as the extent of the contract; the right under it, and the means of enforcing it.

This court is not bound to reverse and remand, with a simple decision, that the plaintiff in error has a right to prosecute its suit to a conclusion. It is not at all incumbent on this court to decline to pass upon the equities of the par-

*every case on the justice of its own pretensions*, and has entrusted that power to a tribunal in whose impartiality it confides."

Cohens *vs.* Virginia, 6 Wheaton, p. 380.

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Full force and effect are given to the eleventh amendment when each State is left free to determine *in the first instance* whether or not, and by whom, it could be sued in its own courts. But that amendment was not intended, and did not assume to abrogate other provisions of the same instrument, which might bear upon or determine the nature of the rights flowing from the State's consent to suit, after such consent *has been acted on*.

The consent having been given by law, and *having been acted on*, the *withdrawal* of that right and the dismissal of the suit at the instance of the State, leaving no remedy, is an

"*active violation*" by a State of the Constitution of the United States, which this court has always redressed by the exercise of its revisory or appellate jurisdiction.

"A case in law or equity * * may truly be said to ~~truly~~ arise under the Constitution, or a law of the United States, whenever its *correct decision* depends on the construction of either."

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4. Controlling questions in this case are whether plaintiff in error had a vested right or a contract with the State, which have been impaired by the States, and whether there was a legal remedy and right of suit against it, which have been virtually abrogated. These are *federal* questions. When the case is brought here, this court must determine for itself the existence as well as the extent of the contract; the right under it, and the means of enforcing it.

This court is not bound to reverse and remand, with a simple decision, that the plaintiff in error has a right to prosecute its suit to a conclusion. It is not at all incumbent on this court to decline to pass upon the equities of the par-

ties, because the State court failed to do so, and avoiding the equities, contented itself with dismissing the suit upon a different and wholly untenable ground. The only effect of the refusal of this court to pass upon the equities would be to enable the defendant in error still further to harrass and delay the plaintiff in error. The case fairly presents the equities of the parties, and calls for a decision on them.

Railroad Company *vs.* Grant, 98 U. S. Rep., 398, does not touch the present case. The decision in that case really rests upon this solid ground, that the Constitution which gives this court its appellate jurisdiction, gives it "*with such exceptions and under such regulations as the Congress shall make.*" The act of Congress of 1879 cited in that case, was a valid exercise of this constitutional power of Congress to make "exceptions" and "regulations" as to the appellate jurisdiction of this court; and by that act, passed in pursuance of the Constitution, the authority of this court to hear and determine that case was taken away.

Durousseau *vs.* The U. S., 6 Cranch, 307.

In the present case, plaintiff in error claims under an act of Congress, and is not opposed or hindered by any act of Congress, but only by the unconstitutional and void action of the legislative and judicial departments of the State.

SAM'L F. RICE,
THO'S G. JONES,
*Attorneys for Plaintiff in Error.*

# In Supreme Court of United States.

**OCTOBER TERM, 1879.**

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

No. 22, original 190.

*vs.*

THE STATE OF ALABAMA, DEFENDANT IN ERROR.

*Brief and Argument of* SAMUEL F. RICE, THOS. G. JONES, and A. A. WILEY, *for Plaintiff in Error.*

BARRETT & BROWN, PRINTERS.

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# In Supreme Court of United States.

OCTOBER TERM, 1879.

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

No. 22, original 190.]

*vs.*

THE STATE OF ALABAMA, DEFENDANT IN ERROR.

This is a writ of error to the Supreme Court of the State of Alabama, sued out by the South and North Alabama Railroad Company, the plaintiff in error, to reverse a decree of said Supreme Court affirming a decree of the chancery court of Montgomery county, dismissing a bill therein filed by the plaintiff in error against the State of Alabama, for an account of what is known as the "three per cent. fund."

Section 6 of the act of Congress passed March 2, 1819, entitled "An act to enable the people of Alabama Territory to form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original States," contains, among others, the following provisions in substance:

"That the following propositions be, and the same are hereby offered to the Convention of the said Territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the Convention, shall be obligatory upon the United States." * * * "*Third.* That five per cent. of the net proceeds of the lands lying within said Territory, and which shall be sold by Congress, from and after the first day of September, 1819, after deducting all ex-

penses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which *three-fifths* shall be applied to those objects within the said State, under the direction of the Legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress."

The Convention referred to in said act of Congress, on August 2, 1819, by its ordinance "irrevocable without the consent of the United States," duly accepted the propositions made by that act of Congress, and formed a Constitution and State Government; and thereupon Alabama was admitted into the Union.

The "*three-fifths*" of the five per cent. mentioned in the 6th section of said act of Congress, is known in the legislation and by the people of Alabama as the *three per cent. fund*—a fund created by that act of Congress and received by the State of Alabama under that act and subject to its provisions, long before February, 1860, but never applied to "those objects within the said State under the direction of the Legislature thereof" prior to February 18, 1860; on which last named day the act of said Legislature "to loan and appropriate the three per cent. fund and its interest" was approved, by which act the Legislature exercised the authority conferred on it by said act of Congress (an authority in the nature of a power of appointment); and through said ordinance and said act of February 18, 1860, and subsequent conveyance and transfer by the Tennessee and Alabama Central Railroad Company to the Mountain Railroad Contracting Company, and afterwards by the Mountain Railroad Contracting Company to the plaintiff in error, authorized and sanctioned by act of the State Legislature (hereinafter set forth), plaintiff in error became the owner of the three per cent. fund to the extent claimed by plaintiff in error in this suit. The right or title of plaintiff in error to the three per cent. fund claimed by it in this suit, is derived from said act of Congress, through the said ordinance of said Convention and the said several subsequent conveyances and transfers authorized and sanctioned by acts

of the State Legislature relating to that fund, referred to in the original and amended bill of plaintiff in error, as well as in this brief.

The bill filed by plaintiff in error to asssert its right or title to the three per cent. fund, was dismissed in May, 1875, without hearing or trial on its merits, and without any fault of the plaintiff in error, by the State chancery court in which it had been filed on April 4, 1874, upon the single ground that subsequent to the filing of said bill, and on December 18, 1874, the State Legislature had passed an act purporting to repeal all acts which authorized the institution or prosecution of any suit against the State in any court of the State. And this dismissal was affirmed by the Supreme Court of Alabama on the same single ground.

The questions involved are as follows :

1. Whether the acceptance, by the Convention of the Territory of Alabama of the propositions submitted for their free acceptance or rejection by section six of the said act of Congress of March 2, 1819, and the admission of such State into the Union upon such acceptance, constituted a contract as to the "three-fifths" of the fund mentioned in paragraph third of that act of Congress, the obligation of which could not be impaired by any mere subsequent legislation of said State, to the prejudice of one who had properly become the owner of such three-fifths of that fund, before any attempt by State legislation to impair the obligation of such contract?

2. Whether a State, accepting by its Territorial Convention, as one of the conditions on which the Territory became a State, a trust fund from the United States, to be applied "under the direction" of the Legislature of the State, to the construction of roads within its limits, after loaning and appropriating, by act of the Legislature, a portion of said fund to a designated beneficiary, and passing laws which were in force at the time of such loan, authorizing suits against the State by such beneficiary, can subsequently pass a repealing statute, stripping its courts of all jurisdiction further to entertain a suit properly brought,

prior to the repealing enactment, against the State, by the beneficiary, to call it to account for the fund?

3. Whether one who had properly become the owner of the "three-fifths" of the fund created by said act of Congress of 1819, mentioned in the third paragraph of section 6 of that act, and had properly sued the State therefor in its own Court of Equity, in accordance with its own laws of force at and long after the commencement of such suit, and had in such suit procured an answer from the State, not questioning, but submitting to the jurisdiction of its said court—can, under the law of the land, be turned out of said court and taxed with the costs of the suit, without any fault on his part, without any trial, and without any cause or pretext other than a subsequent act of the State Legislature, which purported to repeal all laws which authorized the bringing or conducting of any suit against the State, and which was construed by the highest court of the State to strip the State courts of all jurisdiction further to entertain any suit against the State previously and properly instituted in any of the State courts?

4. Whether, under the Constitution of the United States, and the compact above referred to with Alabama, and the said act of the Legislature of said State, approved February 18, 1860, and the act of said Legislature amending said last mentioned act, approved February 7, 1861, and the act of said Legislature "To amend an act entitled an act to incorporate the Mountain Railroad Company," approved December 30, 1868, and the act of said Legislature of December 30, 1868, entitled "An act to amend an act entitled an act to amend an act entitled an act to incorporate the South & North Alabama Railroad Company;" and the facts alleged in the bill in this case, and established by the answer or decree *pro confesso*—the beneficiary of the fund, after its loan and appropriation by the Legislature of Alabama, did not have a contract with the State, the obligation of which could not be impaired, or a title, right or privilege claimed under said act of Congress, or authority exercised under the United States, which could not be lessened by said repealing enact-

ment of December 18, 1874, which, if valid, entirely destroyed the remedy?

5. Whether the State, under the proposition contained in the act of Congress, upon the acceptance of which by the territorial convention the State was admitted into the Union, had any thing more than a mere particular or qualified power of appointment, or power in the nature thereof, over the trust fund created by said act of Congress; and whether or not after the State or its legislature has exercised that power, by loaning and appropriating the trust fund—designating and appointing the beneficiary—the beneficiary does not take and hold under the act of Congress itself, even if it should be held that there was no contract with the State; and this being so, whether the power of the State over the fund, or its right to legislate with reference thereto, is not exhausted, except as to legislation requisite to preserve the fund, and make the appointment effectual.

6. Whether after suit lawfully and properly brought in the State court to enforce against the State, (which a citizen could not sue save in its own courts) a right or title claimed under an act of Congress, a right is not thereby acquired to push the suit to such conclusion that the revisory and appellate jurisdiction of the Supreme Court of the United States may be invoked, if necessary, in determining and enforcing such right or title in such suit; and whether the State can elude or defeat the jurisdiction thus put in motion, and the right or title claimed in such suit, by a subsequent repealing statute compelling the State court to dismiss the suit.

7. Whether the State, in such case as this, ever had or could claim as to this fund, the sovereign's immunity from suit.

8. Whether as against plaintiff in error the said repealing act of December 18, 1874, is valid, as it was decided to be by the highest court of the State.

9. Whether the dismissal of the suit under the facts and circumstances shown in the record, was not an infringement of the Constitution of the United States or of an act of Con-

gress, or of a right or title of plaintiff in error derived therefrom, or entitled to protection thereunder.

10. Whether (even if it should be held that the loan and appropriation to the Tennessee and Alabama Central Railroad Company, under the act of February 18, 1860, did not constitute a contract between the State and that company, which the State could not impair or repeal,) the present plaintiff in error—having acquired the rights of the Mountain Railroad Contracting Company, which succeeded by contract to the rights of the Tennessee and Alabama Central Railroad Company, which transfers were authorized and made effectual by acts of the legislature,—does not stand in the attitude to the State of a third person, having acquired "vested rights" by lawful dealings with the original beneficiary, which the State can not impair.

The manner in which these questions are raised has been briefly stated above, but may be more particularly stated as follows:

The original bill, which was filed April 4th, 1874, alleged that the South & North Alabama Railroad Company was a domestic corporation, and sought an account and decree against the State, as trustee, of the fund arising from the sale of public lands within the State, commonly known as the "three per cent fund" of which the plaintiff in error is the beneficiary or *cestui que trust*. The bill avers the acceptance by the State of the provisions of the "act to enable the people of Alabama territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States"—approved March 2, 1819—and that its legislature, acting for it, accepted said trust and received the fund arising from the sale of said public lands, as provided in said act, and that the State became trustee of said fund. Afterwards by "act to loan and appropriate the three per cent fund and its interest"—approved February 17, 1860—the State ascertained and declared that there was due by the State to said fund, on account of principal and interest, the sum of $858,498, of

which sum there was loaned and appropriated the sum of $663,135, on terms and conditions set forth in that act.

The bill then avers that by the act of the legislature, amending said act of February 18, 1860, under which the Tennessee and Alabama Central Railroad Company was entitled to the sum of $663,135 of said fund, the legislature ratified and confirmed the conveyance by said Tennessee and Alabama Central Railroad to the Mountain Railroad Contracting Company, of all its rights, &c., including the fund appropriated to said Tennessee and Alabama Central Railroad Company by said act of February 18, 1860, after which said Mountain Railroad Contracting Company became and was the beneficiary of said fund, and continued to be so recognized and treated by the State, until the transfer by said Mountain Railroad Contracting Company, of its rights, &c., including said fund, to the South & North Alabama Railroad Company, which has ever since been and now is the beneficial owner of the said fund so loaned and appropriated by act of February 18, 1860. The bill then avers the changes in the corporate name of the Tennessee and Alabama Central Railroad Company, to that of the Nashville & Decatur Railroad Company, pursuant to legislative authority, and sets out compliance on the part of said Tennessee & Alabama Central Railroad Company, and its successors, with the provisions of said act of February 18, 1860, under which said loans and appropriations were to be made, and the completion and operation of the road within the time required by law, excluding the period of the late civil war, which, during the time it was raging, prevented the completion or operation of said road.

The bill further alleges, that in the year 1862, without the consent of the Tennessee & Alabama Central Railroad Company, or either of the companies succeeding to its rights, the State authorized the Alabama & Tennessee Rivers Railroad Company, to which the sum of $225.00 of said three per cent fund had prior to that time been loaned under the provisions of the act of February 18, 1860, loaning and appropriating said fund, to sell the lands mortgaged for its

repayment, and under it said Alabama & Tennessee Railroad Company paid to the State the amount loaned it, the State surrendering the bond and mortgage given to secure the loan, as though the same had been legally paid and discharged, and thus lost its lien, and said company has since become wholly insolvent. The bill also avers a loan by the State of $40,000 of said fund to the Alabama & Mississippi Rivers Railroad Company during the late war; and that a recovery of this sum was defeated on the ground that the loan was made to aid in the prosecution of hostilities against the United States in the war then raging, and that said company is hopelessly insolvent and has ceased to exist.

It is also alleged that this loan was in violation of law and the trust reposed in the State, which should account for the same, but that the South & North Alabama Railroad Company was ignorant of these facts at the time it received from the State the bond and mortgage given by said Alabama & Mississippi River Railroad Company to the State to secure said loan. The bill further avers that the State has not fairly accounted for or paid over to the South & North Alabama Railroad Company, or to the companies to whose rights it succeeded, the said several sums of money, constituting part of said three per cent fund, loaned to the Alabama & Tennessee River Railroad Company, to the Wills Valley Railroad Company, to the North East & South West Railroad Company, or for said sum enacted to be loaned to the Selma & Gulf Railroad Company, which was lost by the loan to the Alabama & Mississippi Rivers Railroad Company, as aforesaid.

The bill further avers that the State has availed itself of its possession of the legislative power to drive hard and unconscionable bargains with the *cestui que trust*, and has driven the beneficiary to accept hard and unconscionable settlements, with respect to said fund, in flagrant violation of the State's duty as trustee, and in utter disregard of equity and good conscience; and has failed and refused, though every effort has been made to that end by the *cestuis que trust*, to make any settlement or adjustment. The bill prays for the

taking of an account of what is due the South & North Alabama Railroad Company by the State on account of said three per cent. fund, and for a decree against the State, as trustee, for the amount found due on final hearing and for general relief.

The answer of the State admits the acceptance of the provisions of the act under which the State was permitted to form a Constitution and State government, and the appropriation of said three per cent. fund by the act of February 18, 1860, and the subsequent laws thereunder to the various companies mentioned in said act. It denies that the State is trustee of any of said funds, for the benefit of the South & North Alabama Railroad Company, or any other corporation, or responsible for failure to collect any loans of said fund from the corporations to which it was loaned. It admits the various legislative acts by which the South & North Alabama Railroad succeeded to the rights of the Tennessee & Alabama Central Railroad Company, and the Mountain Railroad Contracting Company, and the facts stated as to the completion and operation of the railroad of the South & North Alabama Railroad Company, and the interference with the work by the war, but does not admit that the road would have been completed if the war had not intervened. The answer denies that the act authorizing the sale of the lands of the Alabama & Tennessee Rivers Railroad, which were mortgaged to secure the loan to it, or the subsequent doings of those assuming to control the government of the State from January, 1861, to July 21, 1865, were binding upon the State or in any manner released said Alabama & Tennessee Rivers Railroad from liability, and makes the same allegations in substance with regard to the loan to the Alabama & Mississippi Railroad Company. It avers that the State has fairly accounted for the said three per cent. fund, and that on the 6th day of October, 1869, complainant received from the State the obligations of various roads for the several sums loaned out of the amount appropriated by said act of February 18, 1860, in full of all its claims, except that portion loaned to the Alabama & Ten-

nessee Rivers Railroad Co. It also alleges that the South & North Alabama Railroad Company has received, in addition, eight semi-annual installments of interest on said loans.

Afterwards, on the 28th day of November, 1874, the South & North Alabama Railroad Company obtained leave to file, and did file an amendment to the bill. This amendment sets out particularly the various steps which the Tennessee & Alabama Central Railroad Company took to entitle it to the loan under said act of February 18, 1860, and the completion of the road mentioned in said several acts, within the time required by law, by the plaintiff in error. It avers the presentation of an account to the State, showing the various items and amount due to the South & North Alabama Railroad Company as beneficiary of said three per cent. fund, and alleges said account, by mistake, induced by the acts and representations of the State and its officials and the confidence the South & North Alabama Railroad Company reposed in it and its officials, gave credit to the State on account of said loan to the Alabama & Mississippi Rivers Railroad Company, which was not made under authority of law. The amendment further alleges that no act of the State has ever been predicated upon or induced by the presentation of said account, and that neither the South & North Alabama Railroad Company, or those to whose rights it succeeded, have received any other funds or thing of value on account of said three per cent. fund, except as stated in said account. It is further alleged that the act under which the loan was made to the Alabama & Mississippi Rivers Railroad, was passed to aid in the prosecution of hostilities against the United States, and was void. It is further alleged that the loan of $40,000 was ordered to be made to the Selma & Gulf Railroad Company, under mandamus from the State Supreme Court, upon said company's compliance with the provisions of the act of February 18, 1860; that said act required a first mortgage on the property of said railroad company to secure said sum was not complied with, but the money was loaned to it, although its property was already covered by mortgages for an amount far exceeding its value. This com-

pany is insolvent, and the sum of forty thousand dollars belonging to said fund has thereby been lost to the South & North Alabama Railroad Company, and the court which has possession of said Selma & Gulf Railroad Company by a receiver, pending foreclosure of mortgage on its property, has refused leave to the South & North Alabama Railroad Company to make it a party to this suit.

It is further alleged that the Alabama & Tennessee Rivers Railroad Company dissolved and ceased to exist more than six years before the filing of the bill, and has been consolidated into a corporation formed of it and other railroads, known as the Selma, Rome & Dalton Railroad Company, which is insolvent, and is in possession of and managed by a receiver of the Chancery Court of Selma, on creditors' bill, filed by various persons, who obtained an injunction forbidding all persons from suing it, and said court refused, though duly petitioned, to allow the South & North Alabama Railroad Company to make said Selma, Rome & Dalton Railroad Company, or its receiver, a party to this suit.

The amendment further alleges that, since the loan to the Montgomery & Eufaula Railroad Company, under the provisions of the act of February 18, 1860, the State has endorsed and consented to the issue by said Company of $1,200,000 of bonds, secured by first mortgage on its property, which is not worth that sum; that but for this action on the part of the State, the security taken by the State to secure the loan of the three per cent. fund to it, would undoubtedly have been a first lien, and would have secured said loan. The South & North Alabama Railroad Company was ignorant and had no notice when the security given by said Montgomery & Eufaula Railroad for said loan of the three per cent. fund to it, was turned over to, and accepted by the South & North Alabama Railroad Company, that said State of Alabama had thus imperilled the value of the security. The South & North Alabama Railroad has, nevertheless, prosecuted said claim against said Montgomery & Eufaula Railroad Company with great vigor, and will continue to do so, and is willing to credit the State for any

amount recovered on said suit; but, not being at any fault with regard to the same, is unwilling to release the State from the rightful claim of the South & North Alabama Railroad Company on account of said loan by the State to said Montgomery & Eufaula Railroad Company. If the prosecution of said suit against the Montgomery & Eufaula Railroad Company be deemed inconsistent with the rights here claimed, the South & North Alabama Railroad Company is willing to elect.

The amendment makes the State a party defendant, and prays for the relief prayed in the original bill, and for such other and further and general relief as to equity may seem meet.

A summons and copy of this amendment was duly served upon the Governor, on the 6th day of January, 1875 (p. 24).

On the first Monday in March, 1875, a decree *pro confesso* was duly entered upon the amended bill (p. 24].

On the 11th day of May, 1875, the Attorney General moved to dismiss the suit, on the ground that the statutes authorizing suits against the State had been repealed, and the court had no longer authority to entertain the suit (pp. 24 and 25).

On the 14th day of May, 1875, the Chancery Court granted the motion, and dismissed the bill, and taxed the costs against the South & North Alabama Railroad Company (see p. 25.

An appeal was taken to the Supreme Court, which, on the 29th day of April, 1876, affirmed the decree of the court below (p. 30), on the ground that said repealing act stripped the court of all further jurisdiction to entertain the suit.

ASSIGNMENT OF ERRORS.

*Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight and seventy-nine.*

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The South & North Alabama Railroad Company, Plaintiff in Error, *vs.* The State of Alabama, Defendant in Error.

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Afterwards, to-wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said, the South & North Alabama Railroad Company, by Rice, Jones & Wiley, its attorneys, and says that in the record and proceedings aforesaid, there is manifest error in this, to-wit:

1st. The Supreme Court of Alabama erred in affirming the decree of the chancery court, of Montgomery county, dismissing the bill filed therein by the plaintiff in error.

2d. The Supreme Court of Alabama erred in not reversing the decree of said chancery court dismissing the bill therein filed by the plaintiff in error.

3d. The Supreme Court of Alabama erred in deciding and holding that the act of the Alabama Legislature entitled "An act to repeal sections 2534, 2536, 2571 and 3323 of the Revised Code," approved December 18, 1874, was a valid and constitutional enactment, controlling this case, and requiring the dismissal of the bill filed by the plaintiff in error.

4th. The Supreme Court of Alabama erred in holding and deciding adversely to the right of plaintiff in error to enforce in its said suit or in any court of said State, the right, title, and claim of plaintiff in error to the fund in controversy in this suit.

5th. The Supreme Court of Alabama erred in not reversing the decree of said chancery court, and in not rendering a decree in favor of the plaintiff in error.

6th. The Supreme Court of Alabama erred in denying the plaintiff in error any remedy for the enforcement of the right, claim or title set forth in the bill.

And the said, the South & North Alabama Railroad Company prays that the judgment or decree of said Supreme Court of Alabama, may be reversed and annulled, and altogether held for nothing, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgment or decree.

SAMUEL F. RICE,
THOS. G. JONES,
A. A. WILEY,
Attorneys for Plaintiff in Error.

STATEMENT OF TITLE OF PLAINTIFF IN ERROR TO THE FUND IN CONTROVERSY, INCLUDING STATUTES, &C.

The title of the plaintiff in error to the three per cent. fund, is derived from the act of Congress of 1819, through the ordinance of the convention of Alabama accepting its provisions, and the subsequent statutes of the State loaning and appropriating the "three per cent. fund" to the Tennesssee & Alabama Central Railroad Company, which, before the change of its name to the Nashville & Decatur Railroad Company, transferred all its rights to the Mountain Railroad Contracting Company, which in turn conveyed and transferred all its rights to the plaintiff in error—all these transfers and conveyances being by legislative authority and sanction.

A full statement of the acts of Congress, ordinance of the convention of Alabama, the various State statutes, and the contracts, transfers, conveyances, and acts thereunder, showing in detail the source and nature of the title of plaintiff in error, is as follows:

1st. Section 6 of an act of Congress of March 2, 1819, "to enable the people of Alabama territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," which contains, among others, the following provisions:

"Sec. 6. And be it further enacted, That the following propositions be, and the same are hereby offered to the convention

of the said territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States: * * *

* * * * * * * * * *

*Third.* That five per cent. of the nett proceeds of the lands lying within the said territory, and which shall be sold by Congress, from and after the first day of September, in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which three-fifths shall be applied to those objects within the said State, under the direction of the Legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress."

2d. The ordinance of the convention of Alabama, accepting the propositions contained in said act of Congress, which ordinance is as follows:

"ORDINANCE.

This Convention, for and in behalf of the people inhabiting this State, do accept the proposition offered by the act of Congress, under which they are assembled; and this Convention, for and in behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States, and, moreover, that each and every tract of land, sold by the United States after the first day of September next, shall be and remain exempt from any tax, laid by the order or under the authority of this State, whether for State, county, township, parish, or any other purpose whatsoever, for the term of five years from and after the respective days of sales thereof, and that the lands belonging to the citizens of the United States, residing out of the limits of this State, shall never be taxed higher than the lands belonging to persons residing therein, and that no tax shall be imposed on the property of the United States; and that all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State: and this ordinance is hereby declared irrevocable, without the consent of the United States.

Done in convention at Huntsville, this second day of Au-

gust, in the year of our Lord one thousand eight hundred and nineteen, and of American Independence the forty-fourth.

J. W. WALKER,
*President of the Convention.*

Attest:
JOHN CAMPBELL, *Secretary.*"

3d. Section 3 of an act of Congress of July 4, 1836, entitled "An act to carry into effect in the States of Alabama and Mississippi, the existing *compacts* with those States, in regard to the five per cent. fund, and the school reservations," which third section is as follows:

Sec. 3. And be it further enacted, That a sum equivalent to five per cent. of the nett proceeds of the lands within the State of Alabama ceded by the Chickasaws by the treaty aforesaid, which have been or may hereafter be sold by Congress, shall be, and is hereby reserved, out of any moneys in the treasury, not otherwise appropriated, to be applied in the same manner, and for the same uses and purposes as is designated by the sixth section of the act of Congress of the second of March, eighteen hundred and nineteen."

4th. The following sections of the act of the Alabama Legislature, approved December 19, 1853, entitled "An act to incorporate the Tennessee & Alabama Central Railroad Company"—

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That James W. Sloss, Thomas A. Nelson, Boswell Hine, John R. Mason, James F. Sorrel, John R. Harris, W. W. Philips, Robert B. Peebles, M. C. Smith, Wm. D. Hays, A. Sidney Harris, J. N. S. Jones, Thomas Redus, Jonathan McDonald, John T. Tanner, B. W. Townsend, William Mailor, John D. Rather, A. A. Burleson, R. N. Walden, Henry Fennel, R. C. Mason, James Hendricks and George D. Shortridge, their associates and successors, with such other persons as shall associate with them for that purpose, are hereby appointed, constituted and declared a body politic and corporate, by the name of the Tennessee and Alabama Central Railroad Company, and by that name shall be capable, in law, of purchasing, holding or leasing, selling and conveying real, personal and mixed property, so far as shall be necessary for the purposes of this incorpora-

tion; and by said incorporated name, may sue and be sued, plead and be impleaded, answer and be answered unto, in any court of law or equity of this State or elsewhere, and to have and use a common seal, and the same to break, alter or amend at pleasure; to pass such rules and ordinances for the good government of said corporation as to them may seem proper, and generally to do all things necessary to carry into effect fully and completely the object of this act.

Sec. 5. Be it futher enacted, That the said railroad shall extend from the town of Montevallo, in Shelby county, in a northeasterly direction, through Decatur, in Morgan county, and across the Tennessee river at that point, thence through Athens, in Limestone county, and from thence to some point on the boundary line between the States of Alabama and Tennessee, thence to connect with a railroad leading through Pulaski to Columbia, Tennessee; and that said company shall have the privilege of crossing the Tennessee river, either by junction, under contract, with the Memphis and Charleston Railroad Company, for which authority is hereby given, or by the construction of a separate bridge for that purpose, or by any other means that may be necessary to effect a crossing of said river."

5th. An act of the Alabama Legislature, approved November 20, 1862, "to amend the charter of the Tennessee & Alabama Central Railroad Company, and for other purposes," which is as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That for the purpose of better developing the mineral resources of the State, the Tennessee and Alabama Central Railroad Company, or their lawful assigns, the Mountain Railroad Contracting Company, are hereby empowered to construct branch railroads, not to exceed ten miles in length, from any point which may be deemed advisable along the line of said railroad, and in all proceedings on account of the right of way, and land damages along the line of said road and branches, the same forms and proceedings, and the same rules and regulations, shall be observed as are prescribed for like purposes by the charter of the South and North Alabama Railroad Company.

Sec. 2. Be it further enacted, That said Tennessee and Alabama Central Railroad Company, or their legal assigns, be and they are hereby authorized to locate the southern

terminus of said road at any point on the Alabama and Tennessee Rivers Railroad, not exceeding seven miles east of Montevallo.

Approved November 20, 1862."

6th. Section 2 of "an act to change the name of the Tennessee & Alabama Central Railroad Company," which reads as follows:

Sec. 2. Be it further enacted, That the name of the Tennessee and Alabama Central Railroad Company be changed, and that hereafter said road be known by the corporate name and style of the Nashville and Decatur Railroad.

Approved, February 19, 1867."

7th. Act of the legislature, approved August 7, 1868, which reads as follows:

"AN ACT

To amend an act entitled "An act to extend the period of the grading of the Tennessee and Alabama Central Railroad from Decatur to a point a few miles east of Montevallo," approved October 7, 1864, by allowing a further extension of the period for such grading.

Section 1. Be it enacted by the General Assembly of Alabama, That the act mentioned and referred to in the title of this act, which is as follows, viz: "Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the act entitled "an act to loan and appropriate the three per cent. fund and its interest, approved 18th of February, 1860," be and the same is hereby amended by striking out the 8th section of said act the following words: "Within five years from the commencement of the grading of the railroad between Decatur and the Alabama and Tennessee River Railroad, as above designated, the grading to be commenced within twelve months from the passage of this act," and by inserting in lieu of the words so stricken out, the following words, to-wit: "Within five years after the termination of the existing war between the Confederate States and the United States of America," and that each and every part of said act, be, and is hereby so amended as to make each and every part of said act conformable to the foregoing amendment thereof:

Provided, however, That the terms and conditions of the extension herein above allowed may be fixed at the next session of the legislature, and shall be as binding when so fixed, as if fixed in this act, "approved October 7th, 1864," be, and the same is hereby amended by striking out the word "five" wherever it occurs in said act, and inserting in lieu of the word so stricken out the word seven wherever the word five is stricken out.

Approved, August 7, 1868."

8th. Section 1 of act to incorporate the Mountain Railroad Contracting Company, approved February 23d, 1860, which reads as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That John R. Mason, John R. Harris, Jim Henry Malone, J. Haywood, James William Richardson, A. C. Cain, Wm. T. Allen, J. W. S. Dannell, B. W. Maclin, with others, their associates, and such as they may associate with them for the purpose, are hereby constituted a body politic and corporate, by the name of the Mountain Railroad Contracting Company, and by that name shall be capable in law of purchasing, holding, leasing, selling and conveying real, personal and mixed property, and by that name may sue and be sued, plead and be impleaded in any court in this State and elsewhere, to make and have a common seal, and the same to break, alter or renew at pleasure, and the company is hereby vested with all the rights, powers, authority, privileges and immunities which are or may be required, or necessary to contract with and to carry into effect any and all contracts or agreements which said Mountain Railroad Contracting Company may or shall make to and with the Tennessee and Alabama Central Railroad Company for the location, construction and completion of a single or double railroad or way, together with all the rolling stock or equipment thereof of that portion of the line of the said Tennessee and Alabama Central Railroad, extending from the town of Decatur, in Morgan county, Alabama, crossing the Northeastern and Southwest Railroad, at or near Elyton, to that point, where said line of railroad shall intersect or touch the Alabama and Tennessee Rivers Railroad, at or near Montevallo, in the county of Shelby, State of Alabama."

9th. An act of the legislature, to loan and appropriate the three per cent. fund, and its interest," which is as follows:

"AN ACT

To loan and apppropriate the three per cent. fund and its interest.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the sum of eight hundred and fifty-eight thousand four hundred and ninety-eight dollars is hereby declared to be the amount due, as principal and interest, from the State to the three per cent. fund, of which sum one hundred and ninety-five thousand three hundred and sixty-three dollars is the balance due as a loan to the Tennessee and Coosa Railroad Company, under an act approved 17th February, 1854, which said loan is ratified as prescribed in said act, and the balance of said three per cent. fund, amounting to six hundred and sixty-three thousand one hundred and thirty-five dollars, is loaned and appropriated as is hereinafter enacted.

Sec. 2. Be it further enacted, That the sum of two hundred and eighteen thousand dollars of said fund be loaned to the North-East and South-West Alabama Railroad Company; that the sum of seventy-five thousand dollars of the same fund be loaned to the Wills Valley Railroad Company; that the sum of two hundred and twenty-five thousand dollars of the same fund be loaned to the Alabama and Tennessee Rivers Railroad Company; that the sum of forty thousand dollars of the same fund be loaned to the Selma and Gulf Railroad Company; that the sum of twenty-five thousand dollars of the same fund be loaned to the Cahaba, Marion & Greenesboro Railroad Company; that the sum of fifty thousand dollars of the same fund be loaned to the Opelika & Oxford Railroad Company; and that the sum of thirty thousand dollars of the same fund be loaned to the Montgomery & Eufaula Railroad Company, all on the terms, and with the stipulation and conditions, hereinafter prescribed.

Sec. 3. Be it further enacted, That the loans authorized and specified in the second section of this act, shall be for the term of five years, and shall bear interest at the rate of six per cent per annum, which interest shall be payable semi-annually at the treasury of the State.

Sec. 4. Be it further enacted, That before receiving the loans authorized to be made to the said railroad companies

respectively, as provided in the second section of this act, said companies respectively—each acting for itself—shall execute a bond to the State, in double the amount of the sum, to be received in each case, conditioned to pay to the State the sum to be received five years after date, and to pay interest thereon semi-annually from and after date at the rate of six per cent per annum, which bonds, in each case, shall be in proper form to be prescribed by the Governor, and shall be well and amply secured to the satisfaction of the Governor, by mortgage or deed of trust, and such other security as the Governor in his discretion shall require, if in any case he shall deem other security necessary or proper; which mortgages or deeds of trust shall cover and include the railroads of the respective companies, with their appurtenances and franchises, and shall be in such legal form, and shall contain such conditions and provisions as the Governor, in his discretion, may deem proper to prescribe, to render said mortgages or deeds of trust as effectual and convenient, as security to the State, as practicable, including stipulations for the enforcement of the lien of the State, by sale of the premises, in the mortgages or deeds of trust, in any case of default, in such manner and form as the Governor may deem best.

Sec. 5. Be it further enacted, That the sum of one hundred and seventy-three thousand nine hundred and forty dollars be and the same is hereby appropriated to be paid to the Tennessee & Alabama Central Railroad Company, as follows, to-wit: To be paid in six semi-annual installments, of fifteen thousand seven hundred and twenty-eight dollars each for the first three years, and in four semi-annual installments of nineteen thousand eight hundred and ninety-three dollars each for the two next succeeding years, so as to make in all ten semi-annual installments, extending through five years, commencing with, and computing from the payment of the first installment, to be paid on the conditions hereinafter enacted, to be expended by the said Tennessee & Alabama Central Railroad Company, in grading and preparing for the superstructure of that part of the railroad which lies between the town of Decatur and the point of intersection of said railroad with the Alabama & Tennessee Rivers Railroad at or near the town of Montevallo, in the county of Shelby.

Sec. 6. Be it further enacted, That as a condition precedent to the payments authorized in the fifth section of this act, the said Tennessee and Alabama Central Railroad Company shall, within twelve months from the passage of this act, in good faith, commence the grading of that part of

their railroad which lies between the town of Decatur and the point on the Alabama and Tennessee Rivers Railroad, at or in the vicinity of Montevallo, at which said Tennessee and Alabama Central Railroad shall reach or touch said Alabama and Tennessee Rivers Railroad, and shall put to work in constructing or grading the portion above specified of said Tennessee and Alabama Central Railroad, within twelve months from the passage of this act, at least two hundred good and effective hands, with all necessary and proper equipments of tools, carts, and mules, or horses, for the number of hands to be employed on said work.

Sec. 7. Be it further enacted, That before the said Tennessee and Alabama Central Railroad Company shall receive the first semi-annual payment specified and authorized in the fifth section of this act, they shall give bond in double the amount to be received, payable to the State, with good and ample security, to be approved by the Governor, conditioned that the sum to be received shall be well and faithfully expended in the construction of said above designated portion of their said railroad; and with the further condition that the sums so received, by virtue of the fifth section of this act, shall be refunded to the State; Provided, The said company shall fail to complete their grading, as aforesaid, within five years from the time said grading is commenced, and shall produce to the Governor satisfactory evidence that at least two hundred good and effective hands, with necessary outfit or equipment of tools, carts, mules or horses, as aforesaid, have been steadily employed for at least six months, next preceding the application for the payment, in working upon the said portion of their said railroad, and the same bond and security shall be given, and the same proof of work shall be made prior to the receipt of all the other payments, authorized and specified in the fifth section of this act, and next preceding each application. But should said Tennessee and Alabama Central Railroad Company double, treble, or increase their force so as to finish or complete the grading of said portion of their railroad within a shorter period than five years, then and in that event the semi-annual payments, as provided in section five, shall not cease, but continue for five years; *Provided*, That in case said Tennessee and Alabama Central Railroad Company shall fail to keep, or cause to be kept, steadily at work, as aforesaid, the number of hands with proper equipments aforesaid, for any period of six months continuously, or at one time, then and in such case all payments to said company shall cease, and the company shall thereupon pay to

the State all sums received by virtue of section five of this act; *And provided further*, That said payments shall in no event extend beyond the period of five years, dating from the first payment.

Sec. 8. Be it further enacted, That as a further inducement to said Tennessee and Alabama Railroad Company, and in case said Tennessee and Alabama Central Railroad Company shall, within five years from the commencement of the grading of their railroad between Decatur and the Alabama and Tennessee Rivers Railroad as above designated, (the grading to be commenced within twelve months from the passage of this act,) complete the grading of said portion of their said road, and prepare the same for the superstructure, and shall produce satisfactory evidence thereof to the Governor, and execute to the State a bond for the amount to be received, with good and ample security to be approved by the Governor, conditioned to refund the amount to the State, unless the said company shall complete or cause to be completed, within twelve months from the time of the receipt, of the sum specified to be paid to them under this section, the whole line of their road from Decatur to the Alabama and Tennessee River Railroad, at or near Montevallo, so as to permit trains of locomotives and cars to traverse the same; said company shall be entitled to demand, and shall receive as an appropriation and bonus, the sum of six hundred and sixty-three thousand one hundred and thirty-five dollars of the three per cent. fund, it being the amount the State of Alabama was found due said fund, including interest on the first day of January, 1860, (excluding the amount of the loan mentioned in the first section of this act,) and also all the interest which shall accrue on said sum above mentioned, from the first day of January, 1860, to the time of the first payment, as provided in the 5th section of this act, to be paid to the said Tennessee and Alabama Central Railroad Company when the said company shall have completed the grading, and shall have prepared the same for the superstructure of that part of the Tennessee and Alabama Central Railroad from Decatur to the point on the Alabama and Tennessee Railroad above designated, and shall produce satisfactory evidence thereof to the Governor.

Sec. 9. Be it further enacted, That when any of the railroad companies named in this act, shall comply with the terms and conditions of this act or the act of February 17, 1854, relating to said companies respectively and made conditions precedent to the loan or payment of money as the

case may be, the Governor of the State shall draw his warrant in favor of the proper party, for the proper amount on the Controller, who shall draw his warrant for the same upon the Treasurer of the State, which warrant shall be paid by the Treasurer out of the monies in the treasury not otherwise appropriated, and charged to account of the three per cent. fund.

Sec. 10. Be it further enacted, That before the said Tennessee and Alabama Central Railroad Company shall receive the amount specified and referred to in the 8th section of this act, said company shall execute, or cause to be executed, a bond to the State of Alabama in double the amount to be received, with good and sufficient security to be approved by the Governor, conditioned that the amount to be received shall be used exclusively in the procurement of iron to be used in the construction of that part of said Tennessee and Alabama Central Railroad, which lies between Decatur and the Alabama and Tennessee Rivers Railroad hereinbefore designated; and with a further condition that the said Tennessee and Alabama Central Railroad Company shall lay the track of their said road as speedily, at least from the southern terminus of said road towards the north as from the northern terminus towards the south.

Sec. 11. Be it further enacted, That the said Alabama and Tennessee Rivers Railroad in addition to the bond required by this act for the repayment of the sum to be obtained by said company by virtue of this act, shall execute its bond to the State of Alabama in the sum of two hundred thousand dollars, conditioned that upon the completion of its railroad to a point at or near Jacksonville, in Calhoun county, said company shall provide and use in the extension of its road beyond Jacksonville in the direction of the town of Gadsden, in Cherokee county, as said road has been or may be located, a sum equivalent at least to what a *pro rata* portion of the amount to be obtained by said company by virtue of this act, would be, if distributed *pro rata* per mile over the whole extent of said railroad from the town of Talladega to the said town of Gadsden.

Sec. 12. Be it further enacted, That said company shall, by virtue of its acceptance of the provisions and benefits of this act, be further bound to progress with the construction of said road, as fast as its means and resources of all kinds will enable it, until the completion of the same to such a point as it may be located, to, at or near said town of Gadsden; and this section shall stand and shall not be repealed or altered without the express consent in writing, to be filed

in the office of the controller of the State, of the stockholders of the company residing between Jacksonville and Gadsden, and those west of the Coosa river, in the counties of Cherokee and DeKalb.

Sec. 13. Be it further enacted, That the true intent and meaning of this act shall be and is to limit and confirm the appropriations, by this act provided for, to the Tennessee and Alabama Central Railroad Company, to the balance of the three per cent. fund, as specified and stated in the 1st section of this act, to-wit: the sum of six hundred and sixty-three thousand one hundred and thirty-five dollars and the interest to accrue thereon, and while the State will make the semi-annual payment to said company, provided for in the 5th section of this act; yet if in any case interest shall not be collected by the State on any of the loans to be made, under the provisions of this act, to other railroad companies, any loss of interest which may be sustained by failure of the companies to whom loans may be made, or any of them, shall be deducted from the said six hundred and sixty-three thousand one hundred and thirty-five dollars, and from the appropriation thereof made to the said Tennessee and Alabama Central Railroad Company; *And provided further*, That said Tennessee and Alabama Railroad Company shall receive the obligations of the various railroad companies, which may be taken for the loans to such companies provided for under this act, if unpaid at the time said Tennessee and Alabama Central Railroad Company may be authorized to apply for the appropriation provided for in the 8th section of this act in lieu of money, and in that case the said Tennessee and Alabama Central Railroad Company shall have the benefit of all the rights, securities and remedies provided for in relation to the loans authorized to be made to other railroad companies under the provisions of this act, and the State shall not be bound to make good any loss which may be sustained by failure to collect said obligations or any of them.

Sec. 14. Be it further enacted, That in case it shall appear that the funds in the treasury not otherwise appropriated and required to meet other appropriations, shall be insufficient to satisfy the loans and appropriations authorized by this act at the time the same shall be applied for, the Governor shall have power to direct the amount in the treasury not required to meet other appropriations, to be distributed *pro rata* among such of said companies as shall apply for the loans and appropriations authorized by this act, and the balance of such loans and appropriations shall be postponed until the amount in the treasury not required

to meet other appropriations shall be sufficient to satisfy the same: *Provided*, That the Governor may direct the bonds of the State of North Carolina and Virginia, owned by this State, to be paid out as cash to such of said companies as may agree to receive the same, or any part thereof, at not less than par, in lieu of money, under the provisions of this act.

Sec. 15. Be it further enacted, That the sum of twenty-five thousand dollars out of the interest paid into the treasury by the various railroad companies named in this act, to whom the said three per cent. fund is loaned, be, and is hereby appropriated, to be paid as hereinafter specified in six equal semi-annual installments, and to be expended in removing obstructions and improving the navigation of the Tennessee river in that part of said river known as Colbert Shoals; it shall be the duty of the Governer to appoint three discreet and proper persons as commissioners, to receive the sum by this section appropriated, and it shall be the business and duty of said commissioners to superintend and direct the disbursement of this appropriation in such manner as to remove the obstruction created by said shoals, and permanently improve the navigation of said river at said shoals as far as practicable; and it shall be the duty of the Governor to take from said commissioners, before paying out the amount hereby appropriated, a bond or bonds for double the amounts to be received with good and sufficient security, to be approved by him, payable to the State of Alabama, and conditioned that the sums to be received by them under this act shall be faithfully used and applied in accordance with the provisions and requirements of this section; and it shall be the duty of said commissioners to advertise in such newspapers and for such length of time as they may deem necessary to give full notice of the work required to be done, specifying a time and place when sealed proposals for the work required to be done will be opened, and specifying in the advertisement the amount and character of the work to be done, which work shall be let to the lowest bidder, who shall give satisfactory security for the completion of the work required to be done within a time to be specified in the contract for the same, and it shall be provided in the contract for the work, that the obstructions in the river at said shoals shall be removed to an extent at least sufficient to admit the passage of light draft steam-boats in low stages of the river, and it shall be the duty of the commissioners to require such conditions in the contract as will secure the

greatest improvement that may be practicable in the navigation of said river at said shoals.

Sec. 16. Be it further enacted, That the said Tennessee and Alabama Central Railroad Company by their acceptance of the benefits of this act, shall transport free of charge over their roads all troops of the State, with all equipages and munitions of war and other property of the State, whenever such troops, munitions, &c., shall be employed and required in the service of this State.

Sec. 17. Be it further enacted, That the said Tennessee and Alabama Central Railroad Company shall be bound by their acceptance of the benefits of this act, to survey at their own expense in a thorough and proper manner, at such time and on such route or routes as may be required by the president and directors of the Columbus and Tennessee Valley Railroad Company, the said Columbus and Tennessee Valley Railroad, and make a report of said survey to said president and directors as soon as practicable after the completion of such survey, and failing to make said survey shall thereby forfeit all rights to the benefit of this act.

Sec. 18. Be it further enacted, That if any of the companies mentioned in the second section of this act shall fail for six months from the passage of this act, to apply for the loans therein prescribed and to comply with the requirements prescribed in this act, the amount so proposed to be loaned to such company, shall be loaned *pro rata* to the other companies mentioned in the second section of this act, or to such of them as may apply therefor, upon the same terms and conditions as are prescribed in the third and fourth sections of this act: *Provided*, said companies shall apply for the same within eight months from the passage of this act.

Approved February 18, 1860."

10th. An act of the legislature approved February 7, 1861, to amend "an act entitled an act to loan and appropriate the three per cent. fund and its interest," which is as follows:

"AN ACT

To amend an act entitled "An act to loan and appropriate the three per cent. fund, and its interest."

Whereas, by an act of the General Assembly of the State of Alabama, approved February 18, 1860, entitled "An act to

loan and appropriate the three per cent. fund, and its interest," certain powers, rights, privileges and donations were conferred upon the Tennessee & Alabama Central Railroad Company upon certain conditions: And whereas, the said Tennessee & Alabama Central Railroad Company have, in legal form, conveyed to the Mountain Railroad Contracting Company all right, title and interest in and to the said powers, privileges, rights, and donations, and have recommended and consented to the changes and amendments in said act which are hereinafter proposed; now therefore,

Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the said act entitled "An act to loan and appropriate the three per cent. fund, and its interest," be, and the same is hereby amended by striking out the words "Tennessee and Alabama Central Railroad Company," wherever they occur in said act, and inserting in lieu thereof the words, "Mountain Railroad Contracting Company," and the said Mountain Railroad Contracting Company shall thereupon be entitled to all the rights, powers, privileges and donations which are conferred by said act upon the Tennessee & Alabama Central Railroad Company, and be subject to the same duties, liabilities and contingencies as are imposed therein upon the said Tennessee and Alabama Central Railroad Company: Provided, That the said Tennessee and Alabama Central Railroad Company, no matter by whom constructed, shall be constructed to some point at or near Montevallo, as indicated in the said act "To loan and appropriate the three per cent. fund, and its interest," approved February 18, 1860, and that all other railroads now constructed, or hereafter to be constructed, in this State, shall have the right to connect with the said Tennessee & Alabama Central Railroad upon the terms and conditions usual in the comity of railroad companies, without any discrimination against or in favor of any one or more of said other railroads over the rest: Provided further, that neither the foregoing proviso, nor any act to which this is an amendment, shall operate at all in favor of any railroad company that has not first agreed and bound itself to allow to the Tennessee & Alabama Central Railroad Company, and to the Mountain Railroad Contracting Company aforesaid, all the rights and privileges it may claim under the provisions of this act, and not to make or continue any regulation or discrimination to the prejudice of said Tennessee & Alabama Central Railroad Company, or the said Mountain Railroad Contracting Company.

Approved February 7, 1861."

11th. Section 1, act of the legislature in relation to the three per cent. fund, which reads as follows:

"AN ACT

In relation to the three per cent fund.

Section 1. Be it enacted by the General Assembly of Alabama, That the Mountain Railroad Contracting Company, being the beneficiary of the three per cent. fund loaned to certain railroad companies under the "Act to loan and appropriate the three per cent. fund, and its interest, approved February 18, 1860," be and is hereby authorized and empowered, (with the sanction and approval of the Governor,) to make settlement with any of said companies who obtained loans under the above recited act, and to receive any moneys, funds or securities arising from any such settlement, upon giving bond as required by said act, for the faithful application thereof.

Sec. 2. Be it further enacted, That the sale of the North-east and South-west Alabama Railroad, as now advertised, be and the same is hereby suspended.

Approved July 30, 1868."

12th. Act of legislature relating to three per cent. fund, which is as follows:

"AN ACT

Relating to the three per cent. fund.

Section 1. Be it enacted by the General Assembly of Alabama, That the Governor be, and he is hereby, authorized to turn over to the "Mountain Railroad Contracting Company," the beneficiary of the three per cent. fund loaned to certain railroad companies, under an act entitled "an act to loan and appropriate the three per cent. fund, and its interest," approved the 18th of February, 1860, the bonds and obligations, and the securities for the payment of such bonds and obligations arising from the loans made to said railroad companies, under the said act of the 18th of February, 1860; Provided, That the bonds and obligations so turned over shall be a satisfaction to the full extent thereof, of the claim of the said "Mountain Railroad Contracting Company," on account of the three per cent. fund; And provided further,

That the said "Mountain Railroad Contracting Company," shall give bond, to the satisfaction of the Governor, for the faithful application of the proceeds of the said bonds and obligations to the construction of the road from Lime Station, in Shelby county. to Decatur, in Morgan county, Alabama; And provided further, That the amount loaned to the "Alabama & Tennessee Rivers Railroad Company," under the act of February 18th, 1860, shall be exempted from the provisions of this act, and shall not be in any manner affected by any thing contained in this act.

Approved December 30, 1868."

13th. Act entitled "an act to amend an act entitled an act to incorporate the Mountain Railroad Contracting Company, which reads as follows:

"AN ACT

To amend an act entitled an act to incorporate the Mountain Railroad Contracting Company.

Section 1. Be it enacted by the General Assembly of Alabama, That the fourth section of the above recited act, which is in words and figures, as follow, to-wit: "Be it further enacted, That full power and authority is hereby given to the stockholders and president and directors to pass all such rules, ordinances and by-laws for their government, in their respective capacities, as to them may seem proper, and generally to do all things necessary to carry into effect the objects of this act," be and is hereby amended, so as to read as follows, to-wit: Be it further enacted, That full power and authority is hereby given to the stockholders, and president and directors, to pass all such rules, ordinances and by-laws for their government, in their respective capacities, as to them may seem proper, and generally to do all things necessary to carry into effect the object of this act, and also to transfer to the South and North Alabama Railroad Company all the assets, rights, privileges and immunities heretofore enjoyed, held or possessed by the said Mountain Railroad Contracting Company, either by contract or otherwise.

Sec. 2. Be it further enacted, That the section of the above recited act, amended under the provisions of this act, be and the same is hereby repealed.

Approved December 30, 1868."

14th. An act to amend an act entitled an act to amend an act entitled an act incorporating the South and North Alabama Railroad Company, which reads as follows :

"AN ACT

To amend an act entitled an act to amend an act entitled an act to incorporate the South and North Alabama Railroad Company.

Section 1. Be it enacted by the General Assembly of Alabama, That the first section of the above recited act, which is in words and figures as follows, to-wit : "Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the South and North Alabama Railroad Company be and is hereby fully authorized and empowered, in addition to the powers conferred by their charter, to construct branch roads with the main road, and to make such contract or connections as it may deem necessary with other companies, or with other roads; Provided, That nothing contained in this act shall change or affect in any manner the course, route, or indication of the road, as laid down in the original charter of the South and North Alabama Railroad Company;" be and is hereby amended to read as follows : Be it enacted by the General Assembly of Alabama, That the South and North Alabama Railroad Company be and is hereby fully authorized and empowered, in addition to the powers conferred by their charter, to construct branch roads with the main road, and to extend their railroad from the Lime Station, in Shelby county, to Decatur, in Morgan county, Alabama, with the right to use, occupy, and enjoy all the rights, privileges, franchises, and immunities heretofore granted to the Nashville and Decatur Railroad Company, for the purpose of building a railroad from Decatur to some point on the Alabama and Tennessee Rivers Railroad, at or near Montevallo, and to make such contract or connections as it may deem necessary with other companies, or with other roads; Provided, That not less than three of the directors of said railroad company shall hereafter be elected from the stockholders living at or near the north terminus of said railroad.

Sec. 2. Be it further enacted, That the said South and North Alabama Railroad Company is hereby authorized to assume and take upon itself all the contracts and obligations, and to have and to enjoy all the rights, privileges and

immunities heretofore granted, held, or possessed, either by contract or otherwise, by the Mountain Railroad Contracting Company, incorporated the twenty-third of February, eighteen hundred and sixty, and is hereby authorized and empowered to take, receive, and hold all the work done and materials furnished by the said contracting company on that part of the line of railroad, as hereinbefore designated, under and by virtue of a contract with the Tennessee and Alabama Central Railroad Company, dated the thirteenth of December, eighteen hundred and sixty, and to pay for the work so done and the materials so furnished in the stock of the South and North Alabama Railroad Company, and the said South and North Alabama Railroad Company is hereby authorized to assume and discharge all the liabilities, of every kind and description, of the Nashville and Decatur Railroad Company, in and upon that part of its line authorized by this act to be occupied and used by the said South and North Alabama Railroad Company.

Sec. 3. Be it further enacted, That the consent of the board of directors of the Nashville and Decatur Railroad Company, and of the Mountain Railroad Contracting Company, shall first be had before this amendment to the charter of the South and North Alabama Railroad Company shall take effect.

Sec. 4. Be it further enacted, That the act hereby amended be and the same is hereby repealed.

Approved December 30, 1868."

15th. An act to amend sections 1 and 2 of an act incorporating the South and North Alabama Railroad Company, which reads as follows:

"AN ACT

To amend the first and second sections of an act entitled 'An act to incorporate the South and North Alabama Railroad Company.'

Section 1. Be it enacted by the General Assembly of Alabama, That the first section of the above recited act, which is in words and figures as follows, to-wit: 'Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That F. M. Gilmer, jr., J. W. Pryor, N. E. Benson, L. Owen, C. Cromelin, J. E. Belser, S. P. Storrs, B. Trimble, L. B.

Butler, D. C. Neal, L. P. Saxon, N. S. Graham, J. H. Bradford, W. Garrett, with others, their associates for the purpose, are constituted a body politic and corporate, by the name of the 'South and North Alabama Railroad Company;' and by that name may sue and be sued, plead and be impleaded, in any court of this State; to make and to have a common seal, and the same to break, alter, or renew, at pleasure; and the company is hereby vested with all the powers, privileges, and immunities which are or may be required to carry into effect the location, construction, and completion of a single, double, or tripple railroad or way from the city of Montgomery, through Wetumpka, to or near Guntersville, on the Tennessee river; or to some convenient point on the Alabama and Tennessee Rivers Railroad; and to transport, take, and carry on said road or branch, by power of steam, or such other power as to them may be proper to apply; and for the purpose of constructing said road or branch, the said company are hereby authorized to lay them out not exceeding one hundred feet wide through the whole length, and for the purpose of depots, cuttings, bridges, and embankments, and the purposes of necessary turnouts; and for obtaining stones or granites, may take as much more land as may be needed in the construction of said road and branches, with permission to make any lawful contract with any other railroad corporation in relation to the interest of said company; and also, to make joint stock with any other railroad corporation; Provided, That all damages that may be occasioned to any person or corporation by taking any land or material as aforesaid, for the aforesaid purpose, shall be paid for by the said company in manner hereafter provided'—be and the same is hereby amended to read as follows, to-wit: Section 1. Be it enacted, That F. M. Gilmer, jr., J. W. Pryor, N. E. Benson, L. Owen, C. Cromelin, J. E. Belser, S. P. Storrs. B. Trimble, D. C. Neal, L. P. Saxon, N. S. Graham, J. H. Bradford, W. Garrett, with others, their associates for the purpose, are constituted a body politic and corporate, by the name of the 'South and North Alabama Railroad Company;' and by that name may sue and be sued, plead and be impleaded, in any court in this State; to make and to have a common seal, and the same to break, alter, or renew at pleasure; and the company is hereby vested with all powers, privileges, and immunities which are or may be required to carry into effect the location, construction, and completion of a single, double, or tripple railroad or way from such point within the city of

Montgomery as they may select, through Wetumpka, to or near Guntersville, on the Tennessee river, or to some point on the Alabama and Tennessee Rivers Railroad; and also, in addition to the powers heretofore granted, they are hereby authorized to construct a branch railroad from some point on the said railroad north of the said company's bridge across the Alabama river, *via* Prattvile, to Selma, or such point within the State of Alabama as they may hereafter select for their western terminus; and to transport, take, and carry on said road and branches, by power of steam, or such other power as to them may be proper to apply; and for the purpose of constructing said road and branches, the said company are hereby authorized to lay them out, not exceeding one hundred feet wide, through their whole length; and for the purpose of depots, cuttings, bridges, and embankments, and the purpose of necessary turn-outs, and for obtaining stones or granites, may take as much more land as may be needed in the construction and security of said road and branches, with permission to make any lawful contract with any other railroad corporation in relation to the interest of said company; and also to make joint stock with any other railroad corporation; Provided, That all damages that may be occasioned to any person or corporation, by taking any land or material aforesaid, for the aforesaid purpose, shall be paid by the said company in manner hereafter provided.

Sec. 2. Be it further enacted, That the second section of the above recited act, which is in words and figures as follows, to-wit: 'Sec. 2. Be it further enacted, That the capital stock of said company shall be three millions of dollars, or more, if required to complete and fully equip said road and branches, and to provide requisite shops and factories for the use of said company, the same to be made up in shares of one hundred dollars to the share"—be and the same is hereby amended to read as follows, to-wit: That the capital stock of said company shall be three millions of dollars, or more, if required to complete and fully equip said road and branches, and to provide requisite shops and factories for the use of said company, of which the sum of two millions of dollars may be issued as a preferred stock; the same to be made up of shares of one hundred dollars per share.

Sec. 3. Be it further enacted, That the State of Alabama shall not be required to endorse any bonds upon said branch railroad.

Approved February 26, 1872."

The bill avers, and the answer admits, the successive transfers and contracts authorized by the above acts, and that plaintiff in error, by such transfers and contracts, is the owner of the three per cent fund [see answer on p. 9 of printed record]. When these admissions are taken in connection with those resulting from the decree *pro confesso* against the State on the amendment, the rights of the plaintiff in error to the fund are established beyond controversy.

The original bill, and particularly the amendment thereto (p. 15 of printed record), states that within seven years after the termination of the late war between the United States and the Confederate States, and certainly before the 15th day of September, 1872, the grading of said railroad was completed and prepared for the superstructure. The act of August 7th, 1868, given above, extended the period of completion theretofore fixed, until seven years from the termination of the late civil war. This war "began in Alabama on the 19th April, 1861, and ended on the 2d day of April, 1866." *The Protector*, 12 Wallace, 700. Independent of this extension, the facts alleged in this bill show a sufficient excuse for the non-completion of the work at an earlier period, and that there is no forfeiture by reason of non-completion at an earlier period.—*Davis v. Gray*, 16 Wallace, 230.

A decree *pro confesso* was duly taken against the State upon the amendment to the bill, which particularly sets forth the facts as to the time of the commencement of the grading of the road, and the time of its completion and preparation for the superstructure (p. 15 of printed record.)

The effect of a decree *pro confesso* is declared by section 3391 of the Revised Code of 1867, which section is as follows:

§ 3391. (2939) *On such decrees allegations of bill taken as admitted; exceptions.*—In all cases in which decrees *pro confesso* are lawfully taken, the allegations of the bill are to be regarded as admitted, except in the case of infant defendants, lunatics, executors, administrators, and bills for divorce.

STATUTES REFERRED TO IN THE BILL, AS SHOWING THE UNAUTHORIZED DISPOSITION OF THE TRUST FUND AND SECURITIES THEREFOR, IN DEFIANCE OF TITLE OF PLAINTIFF, are as follows:

*First.* An act in relation to the Selma & Gulf Railroad Company, which reads as follows:

"AN ACT

In relation to the Selma and Gulf Railroad Company.

Whereas by an act approved the 18th of February, 1860, entitled an act to appropriate the three per cent. fund, a loan of forty thousand dollars was made to the Selma and Gulf Railroad Company, upon certain conditions in said act contained; and whereas said Selma and Gulf Railroad Company have complied with all the conditions required of them, in order to obtain payment of the sum so loaned; and whereas said railroad company, in the present condition of the country, are willing to postpone the payment to them of said sum of money, until the present war is ended; and whereas the Alabama and Mississippi Rivers Railroad Company are now actively engaged in building a railroad from Selma via Uniontown and Demopolis, so as to unite at Meridian with the railroad now completed to Vicksburg, on the Mississippi river, with the Mobile and Ohio road and with the New Orleans and Jackson road; and whereas, the Alabama and Mississippi Rivers Railroad, forming a connection between the waters of the Alabama and Mississippi rivers, with the Northwest, and with New Orleans, is essential to the government in the existing war, for the transportation of troops, munitions of war, provisions, and the public mails:

Section 1. Be it therefore enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That with the consent of the Selma and Gulf Railroad Company, the payment to the said company of the said sum of forty thousand dollars be postponed until the end of the existing war, and the conclusion of peace; and that upon the ratification of a treaty of peace, said Selma and Gulf Railroad Company shall be entitled to demand and receive from the State treasury, the said sum of forty thousand dollars so loaned, upon giving bond with good security, conditioned that said sum of forty thousand dollars shall be applied alone to the purchase of iron, and the laying of the same upon said railroad, and executing a first

mortgage bond on said railroad and all its rights and fixtures to secure the repayment of said forty thousand dollars, at the expiration of five years thereafter, and the interest thereon, at the rate of six per cent. per annum.

Sec. 2. Be it further enacted, That in the meantime, and until a treaty of peace shall be concluded, the said sum of forty thousand dollars of the three per cent. fund be loaned to the Alabama and Mississippi Railroad: *Provided* said railroad company shall execute and deliver to the Governor its bond, with the most ample and satisfactory security, conditioned for the payment of the said sum of forty thousand dollars, with six per cent. per annum thereon, into the State treasury, within one month after receiving notice to make such payment, according to the terms of this act; such security to be personal, by deed of trust, or by mortgage with power of sale, as the Governor may require.

Approved, December 5, 1861."

*Second.* An act to authorize the sale of lands mortgaged to the State, as follows:

"AN ACT

To authorize the sale of lands mortgaged to the State.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the Alabama and Tennessee Rivers Railroad Company, acting by their board of directors, be and they are hereby authorized to sell the lands mortgaged by said company to the State, as security on account of the loan to the company of a portion of the three per cent. fund, or so much thereof as the said board may deem it advantageous to sell, and shall be approved by the Governor: *Provided*, That no such sale shall be effectual to divest the lien of the State under said mortgage, until the proceeds thereof shall be paid into the treasury, to be credited on the indebtedness of said company on account of said loan.

Approved, November 4, 1862."

THE LAWS RELATING TO THE REMEDY.

The Constitution of 1819, which was the first organic law of Alabama, declared "that the General Assembly shall direct by law in what manner, and in what courts suit may be brought against the State."—Constitution, Art. 6, § 9.

In the years 1820 and 1827, the Legislature, pursuant to this constitutional mandate, passed statutes investing the Circuit Courts with the jurisdiction of suits against the State when brought by citizens, and prescribed the manner of conducting such suits, and the mode of obtaining satisfaction if judgment was rendered against the State. These statutes may be found in Clay's Digest, p. 339, §§ 143–146. These statutes were afterwards substantially carried into the Code of Alabama of 1852 as §§ 2138, 2139, 2140, 2172, and are as follows:

§ 2138. A citizen of this State, or domestic corporation, may bring suit against the State of Alabama in the circuit court of the county in which he resides, or in which such corporation is located, which must, in all respects, be governed by the same rules as suits between individuals.

§ 2139. The solicitor of the circuit in which the suit is pending must attend to the suit on the part of the State, and the Governor may, if necessary, employ assistant counsel, and the judge of the court determine the compensation.

§ 2140. If judgment be rendered against the State, it is the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate must issue until six months after the recovery of judgment.

§ 2172. When the State of Alabama is a defendant, the summons must be executed by leaving a copy of the summons and complaint with the Governor.

The above sections of the Code of 1852 were carried into the Revised Code of 1867, as §§ 2534, 2535, 2536, and 2571—

§ 2534 (2138). *State may be sued by citizens, or domestic corporations.*—A citizen of this State, or a domestic corporation, may bring suit against the State of Alabama, in the circuit or chancery court of the county in which he resides, or in which such corporation is located, which must, in all

respects, be governed by the same rules as suits between individuals.

§ 2535 (2139). *Solicitor of circuit defends for the State.*—The solicitor of the circuit in which the suit is pending must attend to the suit on the part of the State, and the governor may, if necessary, employ assistant counsel, and the judge of the court determine the compensation.

§ 2536 (2140). *Comptroller to pay judgment, on certificate of the judge and clerk, after six months.*—If judgment be rendered against the State, it is the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate must issue until six months after the recovery of judgment.

§ 2571 (2172). *Summons left with Governor when State is sued.*—When the State of Alabama is a defendant, the summons must be executed by leaving a copy of the summons and complaint with the governor.

On the same day that the Legislature passed the act of February 18th, 1860, loaning and appropriating the three per cent. fund, it enacted, out of abundant caution, a statute expressly authorizing suits against the State in the Chancery Court. This statute is embodied, substantially, in sections 3323 and 3331 of the Revised Code of 1867, which read as follows:[a]

§ 3323 (2873*a*). *The State may bring suit in chancery and be defendant therein.*—The State may sue and be sued, by a citizen of the State, or domestic corporation, in chancery, and the suit is governed by the same rules as suits between individuals. The solicitor of the circuit in which the suit is pending must attend to the same on the part of the State, and the Governor may employ assistant counsel, if he deem it necessary, and the Chancellor may determine the amount of compensation; and if unsuccessful, the State is liable for costs as individual suitors are. The direction of the executive of the State, in writing, is sufficient authority to the attorney for bringing such suit.

[a] 18 Feb'y, 60, p. 23; 17 Feb'y, 54, p. 70.

§ 3331 (2880). *Each defendant may demand a copy of the bill; one served on the Governor.*—It is not necessary to serve the defendants with a copy of the bill; but each defendant is, on application

to the Register, entitled to a copy, unless otherwise provided by law, which must be charged in the bill of costs; [c]but when the State is a party defendant, a copy of the bill must be served upon the Governor. [c] 18 Feb'y. 60, p. 23.

These statutes remained in force unchanged until the 18th day of December, 1874, though there were changes of phraseology in the Constitutions of 1865 and 1868, as to the right of suit against the State. In the Constitution of 1819, the provision heretofore quoted was placed under the head of "General Provisions." In the Constitutions of 1865 and 1868, this order is changed, as if to dignify and emphasize the right of suit against the State, and the provision is put in the "Declaration of Rights."

The language of the Constitution of 1865, on this subject, was as follows: "That suits may be brought against the State in such manner and in such courts as may be by law provided."—Art. I, § 15 of that Constitution. This same language was carried into the Constitution of 1868, Art. I, § 16.

The Constitution of 1875 declares, "That the State of Alabama shall never be made defendant in any court of law or equity."—Art. 1, § 16. This Constitution went into effect December 6th, 1875.—See Code of Alabama of 1876, note bottom page 127.

Before the adoption of this last Constitution (which occurred long after the bill and answer in this case had been filed, and the amendment allowed), the General Assembly of Alabama passed the following act:

AN ACT

To repeal sections 2534, 2536, 2571, and 3223 of the Revised Code of Alabama.

Section 1. Be it enacted by the General Assembly of Alabama, That sections numbered two thousand five hunhundred and thirty-four (2534), two thousand five hundred and thirty-six (2536), two thousand five hundred and seventy-one (2571), and three thousand three hundred and twen-

ty-three (3323) of the Revised Code of Alabama, be and the same are hereby repealed.

Sec. 2. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this act, or which make any provisions for bringing or conducting suits against this State, be and the same are hereby repealed.

Approved December 18, 1874.

In the printed acts of 1874-5, the date of the approval of this act is incorrectly given as December 18th, 1875. This mistake is evident, when it is seen that a case involving this statute was decided at the January term, 1875, of the Supreme Court of Alabama, which ended on the first Monday in June, 1875. (See 52 Ala. p. 231 and p. 234.) The certificate of the Secretary of State (on page 677, next to the index) to the correctness of the acts, is dated June 3d, 1875. The Legislature of 1874-5 adjourned in April, 1875. The acts passed and approved in December, 1875, are found in the pamphlet acts of 1875-6.

ARGUMENT.

*I. Plaintiff in error has a binding contract with the State.*

This case in its nature and characteristics is strikingly like the case of *Trustees for Vicennes University v. The State of Indiana*, 14 Howard, 268. The reasoning and principles upon which that case was decided, are controlling in the present case.

The fund in controversy in this suit was originally the absolute property of the United States. Congress by its act of March 2, 1819, "reserved" and set apart that fund, for making public roads, canals, and improving the navigation of rivers within Alabama, "to be applied to those objects, under the direction of the Legislature thereof." No absolute title or ownership was offered to, or vested in the State; but it took and held, as trustee, under the terms of the

proposition contained in that act of Congress, which were accepted by the convention mentioned in said act, in an ordinance "irrevocable without the consent of the United States." It needs no authority to show that this acceptance by said convention was binding on the State, and operated as an agreement by the State to take and hold the fund upon the terms prescribed by Congress. Whatever of gift or bounty there was, *was the bounty or gift of Congress* not of the State. (14 Howard, 268). As between the United States and the State, there was full consideration for the duties and undertakings assumed by *the State*. The agreement thus made, constitutes a *contract* or *compact* between the State and the United States. Indeed the transaction is not wanting in any of the elements of contract when tested by the strictest rules.

Fletcher v. Peck, 6 Cranch, 87.

New Jersey v. Wilson, 7 Cranch, 164.

Terrett v. Taylor, 9 Cranch, 43.

Daughdrill v. Alabama Life Insurance Company, 31 Ala. 91.

Farrington v. Tennesse, 95 U. S. 683.

Dartmouth College v. Woodward, 4 Wheaton, 518.

Ex parte Selma & Gulf Railroad Company, 46 Ala. 423.

Trustees Vincennes University v. Indiana, 14 Howard, 268.

Cooley Con. Lim. 3d ed. top page 284.

McGee v. Mathis, 4 Wallace, 143.

Hawthorne v. Calef, 2 Wallace, 10.

Davis v. Gray, 16 Wallace, 232.

New Jersey v. Yard, 95 U. S. 104.

Section 3 of act of Congress of July 4, 1836, "to carry into effect, in the State of Alabama and Mississippi, the existing compacts with those States in regard to the five per cent. fund and the school reservations."

Until the State acted, and selected the beneficiary of the fund, the compact concerned only the State and United States. Up to that time the compact was but a contract between the United States and the State, for the benefit of the ultimate taker under the power of appointment which Congress conferred on the State. When the State acted, designated and appointed the beneficiary, and loaned and appropriated the fund, the beneficiary, complying with the term of the appropriation, became *eo instanti* a party to a *contract* with the State. The State having only a particular or qualified power of appointment, or power of that nature over the fund, and that power having been exercised, the appointee holds under the original creator or donor of the power, with the superadded strength of a right or title by contract with the State.

Roach v. Wadham, 6 East, 289.

But the title and right of the present plaintiff in error is still stronger. The Tennessee and Alabama Central Railroad Company had a *contract* with the State, as shown above. That company transferred all its rights, including the right to the fund in controversy, to the Mountain Railroad Contracting Company. This transfer was by *contract*. The State deliberately authorized and validated this transfer by a legislative enactment. If it could possibly be held that, as between the State and the Tennessee and Alabama Central Railroad Company, the loan and appropropriation to it of the three per cent. fund was a mere bonus or gratuity, not possessing the elements of a contract so long as no new parties intervened—it is quite certain that after the transfer by the Tennessee and Alabama Central Railroad Company to the Mountain Railroad Contracting Company, which contract was authorized and made effectual by act of the Alabama Legislature, new rights intervened and became *vested* in the Mountain Railroad Contracting Company. To the original consideration, moving the State to make the

loan and appropriation to the original beneficiary, is added the new and distinct consideration passing between the Tennessee and Alabama Central Railroad Company and the Mountain Railroad Contracting Company, inducing the transfer from the one to the other. The State being the debtor, and ratifying and authorizing the transfer by its creditor to another, the State stands to the Mountain Railroad Contracting Company, as though it (the State) had, in the first instance, loaned and appropriated the fund to that company, moved by the considerations inducing the original loan and appropriation to the Tennessee and Alabama Central Railroad Company, with the new and superadded consideration passing between the two companies. The State was in legal effect the *transferror* on valuable consideration. After this, the State did not have the "*power to revoke the contracts of the corporation* [the Tennessee and Alabama Central Railroad Company] *with other parties* [the Mountain Railroad Contracting Company] *or to impair any vested rights thereby acquired.*"

Tomlinson v. Jessup, 15 Wallace, 459.

But the position of the plaintiff in error is still stronger. The Mountain Railroad Contracting Company, transferred all its rights by contract to the plaintiff in error. The Legislature again authorized and validated the contract, and thus the State, the debtor, again became in legal effect, a *transferror*—and that too, on the valuable consideration passing between these last two companies.

The rights of the plaintiff in error stand on yet higher ground. It has *built* and *operated*, upon the conditions prescribed in the act appropriating the fund, the railroad required to be built by the Tennessee and Alabama Central Railroad Company. Even if the loan and appropriation of

the three per cent. fund, remained up to that time, a mere proposition or offer of *bonus* on certain conditions, yet when those conditions were completely and duly performed, by one to whom the propositions were made, the transaction then constituted a CONTRACT, *if never before.*

Tenn. & C. R. R. Co. v. Moore, 36 Ala. 371.

Steamship Co. v. Jolliffe, 2 Wallace, 450.

Memphis v. U. S., 97 U. S. Rep. 293.

People v. State Auditor, 9 Michigan, 327.

Aside from the establishment of these propositions by the foregoing authorities, they are sustained by the decision of the highest court of Alabama, long before the present suit was brought, in a controversy relative to a portion of this very fund, involving the construction of the very statutes through which the plaintiff in error claims.

Ex parte Selma & Gulf Railroad Company, 46 Ala. 423.

In that case it is said: "This is a *trust fund*, and the *State is the trustee*, and it is bound in good faith to pay the interest on it, or to loan it out, or invest it as the terms of the gift require."—46 Ala. 427–428. Again, "the funds loaned and appropriated *are not the property of the State*, or such as the State may legally confiscate, or divert to its own use. They are wholly trust funds and should be dealt with as such, loaned out and increased as much as possible, until applied to the very important use for which they were given by the government of the Union to the State; that is to the aid of such works of internal improvement as are named in the gift.—Act of Congress, March 2, 1819, *supra*," p. 430. * * * * "This statute has never been repealed, suspended, or modified. Its purpose has not been accomplished. It can not be repealed by *non-user*. It must, therefore, still be in force."—p. 430–431.

*II. This contract is enforceable by "legal remedies" against the State.*

Having shown the existence of a most solemn and binding contract between the State and the plaintiff in error, it re-

mains to consider the remedy which the law gave for the enforcement of that contract and of the rights growing out of it.

It is shown by the statutes cited, that ever since the year 1820—*continuously up to the repealing act of December 18th, 1874*—the laws of Alabama had given a right of suit by a citizen, or domestic corporation, against the State, coupled with a speedy mode of enforcing and obtaining *satisfaction* out of the State. It is not necessary to follow this legislation in all its details. Going back to the Ala. Code of 1852, we find, in section 2138 of that Code, provision for suit against the State by a citizen "or domestic corporation," and in a subsequent section, 2140, provision that the comptroller—"on certificate of the clerk of the court, together with that of the judge who tried the case, that the recovery was just,"—should issue his warrant for the amount of the judgment. Afterwards, the provisions of the law were so extended as to expressly authorize suits in chancery against the State, "by a citizen or domestic corporation." The Code of 1867 continued these provisions, including that requiring the comptroller to draw his warrant for the amount of the judgment against the State. The act of February, 1860,—*passed on the very day of the act loaning and appropriating the three per cent. fund,*—is carried into the Code of 1867 as part of section 2534, which contains the old provision authorizing citizens and domestic corporations to sue the State in the Circuit Courts, with the expressed right, provided by said act of 1860, to sue in the Chancery Courts. This section, as if to emphasize the right of suit given to the citizen, provides that such suits "*must in all respects be governed by the same rules as suits between individuals.*"

These laws, with the valuable remedies they provided against the State, had been in force (with the exception of the express mention of right to sue in chancery, which was given in 1860) for thirty years, when the loan and appropriation was made to the Tennessee and Alabama Central Railroad Company, and had existed unimpaired for more *than half a century*, when the plaintiff in error commenced its

suit. With these laws in force at, and long before the making of the several contracts through which the plaintiff in error claims, and continuing long after its suit was commenced,—can any subsequent State statute destroy all right of suit and all remedy? We say not.

The following propositions may be considered "*axioms in our jurisprudence*":

1st. The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement.

2d. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of *validity* and *remedy* are inseparable, and both are parts of the obligation which is guaranteed by the constitution.

3d. The obligation of the contract *is "the law which binds the parties to perform their agreement."*

4th. Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the constitution.

5th. The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of the contract in this way, *than to attack its vitality in any other manner.* Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. *It must be left with the same force and effect,* INCLUDING THE SUBSTANTIAL MEANS OF ENFORCEMENT, WHICH EXISTED WHEN IT WAS MADE. The guarantee of the constitution gives it protection to that extent."

Walker v. Whitehead, 16 Wallace, 315.

The cases even go further, and hold that new rights and remedies given after the making of the contract, or enlarging

those in existence when the debt was created, are beyond the reach of the legislature, and can not be repealed.

Memphis v. United States, 97 U. S. 293.

The principles declared in *Walker v. Whitehead, supra*, have time and again been applied to the contracts and dealings of *States*, as well as individuals.

Farrington v. Tennessee, 95 U. S. 682–3, and cases there cited.

New Jersey v. Yard, 95 U. S. 104.

In the case of *Tennessee v. Sneed* (96 U. S. p. 74), in which it was argued that the taking away of the remedy by *mandamus* was an impairment of the contract involved in that case, the court placed its adverse decision, upon the ground that the statute repealing the remedy by *mandamus*, gave "*an abundant means of enforcing the right.*" On page 75, 1st paragraph, speaking of the remedy given by the subsequent statute, it is said, "*provision is also made for prompt payment of the amount by the State, if judgment is rendered against the officer on the merits.*"

It stands out clearly in that case, as in all the decisions of this court, that the repealing statute would have been adjudged void, if a clear and unembarrassed remedy had not been left.

The situation of the present plaintiff in error is in marked contrast with that of the plaintiff in *Tennessee v. Sneed, supra.* The Alabama repealing statute, not only makes no "provision for payment of the judgment," but expressly and directly *blots out the law which made such provision.* It leaves no remedy whatever. The State courts are forbidden to hear its own citizens, in the assertion of rights, which, at the time they accrued, and long after, were "enforceable" as matter of right—not of grace—in the State courts. The "substantial means of the enforcement of the contract, which existed when it was made,"—*the right to judgment and warrant of the comptroller*—are swept away, the courts are shut, and the citizen is left to the whim and caprice of the legislature of the State, which has already recklessly and defiantly repu-

diated his right! If this state of things can be brought about constitutionally, it is vain to say that the plaintiff in error ever had a *contract*. In the language of the Supreme Court of Alabama, in *Rather v. Commissioners Court*, 48th Ala. 447, to call a thing a *contract*, when there is no legal means for its enforcement, is the use of "*a mere legal sophism*."

*III. The State of Alabama is not a sovereign as to this fund, or exempt from the jurisdiction of the courts.*

Against this unbroken current of authority, consonant alike with justice and common honesty, the vain plea is set up that Alabama is a sovereign State, and may break her contracts, and defy the constitution and laws of the United States! There are several plain answers to this:

1st. As to this fund, and the rights arising under the acts creating it, the State never became invested with the sovereign's immunity from suit.

2d. By accepting the trust, under the circumstances under which it arose, the State *pro hac vice* invested itself with the character of a private trustee.

3d. Even if full sovereignty as to other matters be conceded to Alabama, she can not, while a member of the Federal Union, exercise this sovereignty so as to impair vested rights or destroy the obligation of contracts.

Sovereignty implies supremacy, or at least *equality with* all other sovereigns, the condition of having no lord or superior. The States of the Union, under our form of government, are, sovereign as to some matters, and without sovereignty as to others. When the propositions in the act of Congress of 1819, were submitted to the people of Alabama, she was a mere territorial dependent of the United States, without right or claim of sovereignty. This territorial de-

pendent could not become a sovereign State of the Union, except by act of Congress. Its creator, the United States, could impose conditions at pleasure (save as limited by its own constitution), upon which the territory could become a State. To the extent which those conditions were imposed and accepted, to that extent the sovereignty with which the State might otherwise be invested, was displaced. These conditions were coeval with the birth of the State, and really formed part of its organic law, though declared only in its ordinance. The provisions of the constitution formed by the convention of 1819, except as to rights protected by Federal law, can all be repealed or altered, because the State is sovereign as to them. The ordinance accepting the conditions and propositions upon which Congress offered admission into the Union, can not be repealed by the State, because the State is *not sovereign* as to these matters. By its ordinance the State parted with or waived sovereignty as to them. In compliance with the conditions upon which the territory was offered admission, and became a State of the Union, Alabama made an "irrevocable contract" and "compact" with the United States, its creator, accepting and undertaking to execute a defined *trust*. The State's duties and rights, as to this fund, must, therefore, be determined, not by its character as a State in reference to other matters, but by the nature of the contract, "compact," or conditions upon which the United States admitted Alabama into the Union. Alabama was never a sovereign as to this fund. Its creator, before entrusting the State with existence or sovereignty, subtracted from the sovereign power, to which the State might otherwise have succeeded, by placing limitations and conditions upon the powers of the State as to this trust. It is not the case of a mere "compact" between two coequal sovereignties. The State does not stand in the same relation to the United States, with reference to this matter, as it would to any foreign power, with whom it had lawfully made a compact.

The State of Alabama was admitted into the Union, whose courts were the final arbiters in the matter of protecting

contracts from impairment, and to whose judgments the States must bow. A State thus bound to obedience to the courts of another power, as to a particular matter, can not be a sovereign as to such matter. This sovereign power of protecting contracts from impairment, involves not only the protection of the contract, but also the right and duty of determining whether there be a contract, and that being ascertained, of protecting and enforcing the contract.

Delmas v. Insurance Co. 14 Wallace, 661.

Jefferson Branch Bank v. Skelly, 1 Black, 436.

Bridge Proprietors v. Hoboken Company, 1 Wallace, 116.

Town of Venice v. Murdoch, 92 U. S. 494.

Furman v. Nichol, 8 Wallace, 44–56.

When, therefore, a State, as a condition precedent to its admission into the Union, enters into a *contract* or "compact" with the United States (whose courts stand to the State in the relation of a superior as to the matter of protecting compacts or contracts from impairment), the State makes not merely a compact, binding in honor, but by the very structure of the government into which it is admitted, binds itself to submission to the judgment of the courts of the United States. As said by Marshall, C. J., in speaking of the division of sovereignty between the government of the Union and those of the States, "they are each sovereign with respect to the objects committed to it, but neither sovereign with respect to the objects committed to the other."

McCulloch v. Maryland, 4 Wheaton, 410.

The marked difference between the relations of Alabama and the United States, with reference to this fund, and those of the United States and Great Britain, after the Geneva award had been paid to our government, is too obvious to require argument, and we may therefore dismiss, without further comment, that portion of the opinion of the State Supreme Court, in this case, which puts the two cases on a parallel.

*IV. The right of suit against a State, with an efficacious remedy for collection of the judgment by "legal" means, given by its own laws in force at the time the State makes a contract, is a vested legal right, which can not be withdrawn after being acted on.*

If a State may make a *contract*—if the obligation of that contract is "is the law which binds the parties to perform their agreement"—if the law exising at the time and place of making the contract, and where it is to be performed, enters into and forms part of the contract—if this includes the remedy or means for its enforcement—(and all these postulates are "axiomatic" in this court, 13 Wallace, 315)—it would seem necessarily to follow, that the State can not repeal all the laws giving a remedy against it, at the time a contract with it was made, and substitute none others in their stead.

If the law be otherwise, it can only be so, because a State of the American Union can not make a *contract*, which imposes a "legal obligation" upon it, as contradistinguished from a moral obligation, or duty binding only in *foro conscientiæ*.

Story, in his Commentaries on the Constitution, Vol. 2, Book 3, § 1380, p. 232, says: "When the obligation of contracts is spoken of in the Constitution, we are to understand, not the mere moral, but the legal obligation of the contracts * * * * * It is the civil obligation of contracts which it is designed to reach; that is, the obligation which is *recognized* by, and *results from, the law of the State in which it was made.*" So the question, whether a State of the Union may make a *contract* imposing a "legal obligation" on it, is to be determined, not by the sovereignty of the State, but "by the obligation which is *recognized by* and *results from* the law of the State in which it was made."

It is shown by the constitutions, statutes of the State, and decisions of its highest court, that, *for more than half a century*, without any question or dispute during that long period, the "obligation" *recognized* by, and *resulting* from the laws of Alabama on a contract made with the State, included, among other things, the right to sue the State—to have judgment against it—and to have that judgment satisfied by warrant on the treasury.

The laws authorizing such suits against the State, and giving a legal remedy against it, were continuously in force from the year 1820, until December 18th, 1874. "During the long period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal." *Pine Grove v. Talcott*, 19 Wallace, 678. As was said by Brickell, C. J. (in Riddle v. Hill, 51 Ala. 2 paragraph, page 232), "a court called to pronounce judgment on such a contract, must consider the historical facts to which we have adverted, * * * * to enable it to arrive at the intention of the parties, in ascertaining what shall be the legal effect of the contract."

If it be said that the law existing at the time when the contract was made with the State, was that the State might, at pleasure, withdraw its consent to be sued, and that this law entered into and formed part of the contract, and hence permission or consent of the State to be sued might be withdrawn, without impairing the obligation of the contract—we reply that no such right was known to the jurisprudence of Alabama, or was ever claimed or existed here, prior to the repealing act of December 18th, 1874, which passed in the very teeth of the then existing Constitution.

Such a right was explicitly disavowed by the constitutions, statutes and courts of Alabama, until long after this suit was brought. This uniform construction of the Alabama Constitution, expounded by its courts, and acted upon by its

law-makers, having prevailed when the rights here asserted accrued, and at the time when suit was brought, no subsequent change of policy or decisions can affect this case.

Gelpcke v. Dubuque, 1 Wallace, 205.

Besides, the assertion of the right of the State to withdraw, at pleasure, its consent to be sued, after it has once been given and acted on, in such a case as the present, involves a denial of the supremacy of the Constitution and laws of the United States.

*IVb. Beers v. Arkansas, not in point, and not authoritative.*

There would seem to be little room for controversy as to the power of a State, to make a contract imposing a "legal obligation" on it, but for the remarks of Chief Justice TANEY, in *Beers v. Arkansas*, 20 Howard, 531. That case is cited as authority for the proposition that such a thing as the *right* of suit against a State, on contracts made with it, can not exist, and that a State may at pleasure repeal all laws giving a remedy against it, in its own courts.

The only questions really passed upon and decided by the Supreme Court of the United States, in that case, are thus stated by Chief Justice TANEY: "It [the State court] has decided merely that it has no right under the laws of the State to try" the rights of the parties, "unless the bonds given by the State are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction to proceed further in the suit. There is evidently nothing in the decision, nor in the act of the Assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the State court."—p. 531. The adverse judgment of the Supreme Court of Arkansas, which Beers brought to this court, was rendered by the Arkansas court on the authority of *Platenius v. Arkansas*, 17 Ark. 574. In the Ar-

kansas decision the right of that State, as a sovereign, to withdraw its consent to be sued, was not even intimated, and the decision was put on very different grounds.

The sum and substance of the decision in *Beers v. Arkansas*, is this: "A State statute forbidding judgment in suits against the State, unless the written evidences of the debt sued on, be filed within a prescribed period, and directing the dismissal of suit if this be not done,—does not in any wise impair the obligation of contracts, and is nothing more than a valid regulation of the mode of suit."

To this extent *Beers v. Arkansas* is *authority* and binding upon this court. All beyond this is *obiter*, entitled to great respect, but not authoritative. The other questions discussed by the Chief Justice, were not necessary to the decision of the case, and not involved in the point actually decided. The *dicta* to the effect that laws giving a remedy by suit against the State were no part of the contract, have in effect been quietly but frequently ignored, in later decisions of this court, directly involving the power of States over contracts made by them. Stripped of the *obiter*, the opinion in Beers' case goes no further than the recent case of *Tennessee v. Sneed, supra.* The Arkansas statute before the court in *Beers v. Arkansas*, did not assume to take away *all* remedy, but like the Tennessee statute, discussed in *Tennessee v. Sneed, supra*, merely "regulated the mode of suit," leaving an ample and unembarrassed remedy for the enforcement of the right. There is a radical and far reaching difference between those statutes and the Alabama enactment, which sought not to regulate the mode of suit, but to destroy all remedy and to forbid all suits.

*IVc. Sovereign right to withdraw consent to be sued, as affected by the Constitution of the United States.*

In considering this question, we must not lose sight of the fundamental difference between the sovereignty of the States

of the American Union, and that of other independent powers or States. This vital difference springs from the Constitution of the United States. Because certain rights and immunities of sovereignty are conceded to other independent powers, it does not necessarily follow that a State of the American Union may lawfully claim and exercise them. For the same reasons, decisions of the English courts, and the views of International Law writers, are of little value, in a case like this.

In theory, all governments protect contracts. Such protection is imbeded in our own fundamental law, which expressly guards against the impairment of the obligation of of contracts *by the States.* In determining the right to do what the State of Alabama has attempted in this instance, we are not called upon to discuss the rights of an unfettered sovereignty, but to measure the sovereignty of a State, narrowed and circumscribed by the Constitution of the United States.

Here the plaintiff in error had a *contract*—a contract on valuable consideration. It had a "*vested right of action*," and was pursuing that right. "A vested right of action is property in the same sense in which tangible things are property," and is equally protected against arbitrary interference. "Where it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."—Cooley Con. Lim. § 362, 1 edition. It may be, that where a State makes an agreement with one of its own citizens, and its laws give no remedy for its enforcement, that the courts are powerless. It is then a matter of conscience with the sovereign, and the citizen must rely on the public faith.

But when, at the very time the agreement is made, or afterwards, a law is passed giving a *remedy*, the agreement acquires all the force of a *contract*—that law enters into and forms part of it, and the legislature of a State of the American Union has no more power to interfere with or repeal such law, than it would have to change the time in which a contract between third parties is to be performed, the parties who shall share in its benefits, or the nature or amount of the consideration. Each and every term of the contract is protected from impairment. The State may not be bound to *give* the remedy, but *having given* it, the Constitution of the United States incorporates such remedy into the contract, and prohibits the State from taking it away. In matters of contract, *jurisdiction*, once vested in the courts, *to enforce the contract*, becomes the "remedy" and *forms an inseparable part of the "obligation" of the contract*, if there is no other remedy than by the exercise of that jurisdiction.

The power of taxation is the most vital of all the sovereign powers. It is also a general principle of our jurisprudence, that one legislature shall not tie up the power of its successors. Yet both of these powers, so vital to the prosperity and welfare of government, yield to the requirement of the Constitution of the United States, against the impairment of the obligation of contracts. Whenever a State, *by its laws* or agreements, enters into a *contract* as regards taxation, the power of succeeding legislatures is gone; because if succeeding legislatures could recede at will from the agreements of their predecessors, there would be no *contract*. The existence or exercise of such power, and the existence of the *contract*, at one and the same time, is a legal impossibility. The power is waived and abandoned, because such waiver and abandonment are essential to the existence of the "contract." So, too, where a contract is made with the State, and a remedy by suit given for its enforcement—power to

take away at will that remedy *by suit*, is gone; for if it existed, there could be *no contract*. There can be no contract, the "obligation" of which is within the protection of the Constitution of the United States, where the remedy exists only by grace. This court has often decided that contracts made by States, are within the protection of the Constitution of the United States. There can be no difference in principle between the waiver of the power of taxation, and the waiver of the power to repeal laws authorizing the bringing of suits against the State.

*I Vd. Cases distinguished from this.*

The cases of *Insurance Company v. Ritchie*, 5 Wallace, 545; *Ex parte McArdle*, 7 Wallace, 514, and *Norris v. Crocker*, 13 Howard, 429, will doubtless be relied on by the defendant in error, to sustain the decision of the State court, that the repealing act of Deeember 18th, 1874, took away all jurisdiction of the Chancery Court of Montgomery to proceed further with the cause.

It will be observed, on an analysis of these cases, that none of them involve the point here presented. The case in 13 Howard, 429, was as to a *penalty*. The case in 5 Wallace, 545, was as to jurisdiction of the United States Court as between *citizens of the same State*, in suits arising under the revenue law, after the repeal of the provision authorizing such suits. McArdle's case involved the jurisdiction of the Supreme Court in *habeas corpus* cases from the Circuit Court.

There was no matter of *contract* as to the *penalty*, in the first case. In the second, the right of suit—the remedy—against the collector remained in the State courts. The repealing act in McArdle's case, did not take away all the appellate jurisdiction of the Supreme Court in *habeas corpus* cases. In the case at bar, if the repealing act is valid, there

is *no remedy* whatever in *any court* or tribunal, State or Federal.

The cases above referred to, do not decide upon the effect of a repeal of all laws authorizing suit in matters *of contract*, and depriving the party of all remedy *by suit*, or otherwise, in any court or tribunal, State or Federal. Indeed, we have been unable to find any cases, except the present and that of *Ex parte State*, 52 Ala. 233, which directly decide in favor of any such doctrine.

The cases of *Hunsaker v. Borden*, 5 California, and *Sharp v. Contra Costra County*, 34 California, 291, cited in *Ex parte State* 52 Ala, 236, are not adverse to the views here asserted. In the case of *Sharp v. Contra Costra County*, *supra*, speaking of the right to suit and judgment against the county, which was afterwards taken away, the court say, that such judgment "*only had the effect of converting a disputed into an audited claim.—Emeric v. Gilman*, 10 Cal. 404."

The California statute, like the Arkansas law discussed in *Platenius v. Arkansas*, *supra*, gave no *legal means for enforcing satisfaction* of the judgment. There was, in fact, no legal remedy after judgment—"entreaty" to the legislature was the only means of obtaining satisfaction. Those cases presented very different questions from this.

We submit, however, in the light of the decisions of this court, since the Arkansas and California cases, whether the taking away of the right, existing when a claim accrues, to have it settled and audited by the courts in a judicial proceeding, governed by fixed principles and general rules, and compelling the party to submit the establishment of his rights to the caprice, or ungovernable discretion of a legislative body, is not taking away a valuable right, and impairing the "obligation," by frittering away the remedy; and whether the Arkansas and California cases are not amenable to that objection.

The case of *U. S. v. McLemore*, 4 Howard, decides simply that the *United States* can not be sued, except by its own

consent, given by law. That case was followed in *Hill v. United States*, 9 Howard, 389. In neither case did the complainants ever have a right, given by law or otherwise, to sue the United States; neither did the United States consent to suit. In both cases, judgments were sought against the United States for acts done in their sovereign capacity. *Yeaton v. U. S.*, 5 Cranch, 283, involved a question of *penalty*, not of contract, and decides merely that after the repeal of a penal law, without a saving clause, penalties can not be enforced, for violations of a statute, committed while the law was in force.

The foregoing were the principle authorities relied on by the State in the court below; and it will be seen that none of them involve the questions presented in this case.

*V. Platenius' case, an authority in favor of plaintiff in error.*

The case of *Platenius v. Arkansas*, 17 Arkansas, 524, is cited in support of the opinion in *Ex parte State, supra.* It will be seen on examination that it does not sustain the result reached in this last case.

When Platenius brought his suit, the statutes of Arkansas authorized suits against the State, which might be prosecuted to judgment, in the same manner as suits against individuals—but there the parallel ceased. When judgment was rendered against the State, it was made the duty of the auditor to transmit a copy of the judgment to the General Assembly, which should make an appropriation for its satisfaction (17 Ark. 524). No compulsory process was afforded. There was nothing in the Arkansas law akin to the direction of the Alabama statute to the auditor, to draw his warrant on the treasurer.

After Platenius' suit was brought, the Arkansas legislature passed the act forbidding judgment against the State, and directing the dismissal of the suit, unless the bonds declared on were filed within a prescribed period.

The Supreme Court of Arkansas sustained the validity of this last statute, "because thereby no means of enforcing the duty of performing the contract, recognized and enforced by law, was taken away, and *necessarily the obligation of the contract remained the same.*" (See 17 Arkansas, top of page 528). The court said in effect, that under the statute in force when Platenius' suit was brought, the proceedings were but "a mode of application to the legislature for satisfaction of the claim, and that, without resorting to them at all, the same statute allowed direct application to that department for the satisfaction of the claim."—*Ib.* p. 527. Speaking of the judgment allowed by the Arkansas statute, the court say, in effect, that *satisfaction* of it was not compellable by law—that there was no power in the court to compel the appropriation which rested solely with the legislature, and therefore "the remedy in question was, in truth, but an imperfect one, precatory in its nature, and living but in entreaty; and consequently totally inadequate to enforce peremptorily the duty of performing the contract." Hence it was held, that the judgment allowed, was but a mere means of ascertaining the existence and amount of indebtedness, and of no more effect than the finding of an accounting officer, without any legal remedy, except "entreaty" to the legislature; and taking away the right to *such a judgment*, left the obligation of the contract unimpaired, because the party was in no worse condition, after the repeal of the statute than before.

*VI. Efficacy of the remedy given by the Alabama statutes, and its enforceability by legal remedies*, and the wide difference between those statutes and the Arkansas statutes passed on in *Beers v. Arkansas.*

The effect of a judgment under the Alabama statute, was to give a vested right of satisfaction, with an adequate and speedy legal remedy for enforcing it. No resort to the Legislature was necessary. No special appropriation was needed. The Auditor was to draw his warrant on the Treasurer, and it was the duty of that officer to pay it. The act authorizing such warrant was itself "*an appropriation by law*" for the payment of warrants drawn under it. This has been the doctrine of the Supreme Court of Alabama for more than forty years past.

Nichols v. The Comptroller, 4 Stewart & Porter, 430.

Reynolds, Auditor, v. Taylor, 43 Ala 430.

Under the remedy given by the Alabama statute, there was no need of "entreaty;" nothing more was required than the performance of ministerial duties, by the officers of the State, in paying out money which the State laws provided should go to the satisfaction of the judgment. If the State officials failed in this, the courts, without coming in conflict with the sovereign, or encountering the arms of "prerogative," would summarily compel the performance of duty by these officers on writ of *mandamus*.

Woodruff v. Trapnall, 10 Howard, 190.

Davis v. Gray, 16 Wallace, 220–221.

Nichols v. Comptroller, 4 Stew. & Por. 154.

Board of Liquidation v. Whitcomb, 92 U. S. 531.

In Alabama, such a suit lies even against the Governor.

Tennessee & Coosa R. R. Co. v. Moore, 36 Ala. 371.

See, also, Ex parte Pickett, 24 Ala. 491.

If it were possible that a Chancellor, presiding over the court and rendering the decree, and clothed with the power to grant a rehearing, should allow the decree to stand, and yet refuse "to certify that the recovery was just," he could

be compelled to give such certificate by *mandamus*, and the clerk would be amenable to the same remedy.

City of Galena v. Amy, 5 Wallace, 705.

The law could scarcely devise a more complete, speedy, and efficacious legal remedy, and means for its enforcement, than were given by the Alabama statute for the satisfaction of judgments against the State. When the right to suit confers such valuable results, surely such right of suit becomes of the very essence of the remedy. When this *right* is taken away, and only the *privilege* of "entreaty" left, the law which works such a result, necessarily kills the "obligation." Upon the facts here presented, the court delivering the opinion in Platenius' case would have been compelled to hold the Alabama repealing statute void.

*VII. State statutes not the only sources of jurisdiction of State courts, when jurisdiction has once attached, and its continuance is essential to the enforcement of a contract.*

Even if the position be sound, that where jurisdiction of a State court is derived and continued solely by its own laws, a repeal of those laws takes away that jurisdiction, it does not follow that the repeal of a State law takes away jurisdiction of the State court, which (though initiated under the State statute) thereafter must continue by force of the Constitution of the United States, or laws passed in pursuance thereof, because necessary to uphold and enforce a right by contract, incapable of enforcement except through the *continuance of that jurisdiction.*

Durousseau v. United States, 6 Cranch, 307.

The United States v. Schooner Little Charles, 1 Brockenborough, p. 355, next to last paragraph.

The case of *Hollingsworth et al. v. Virginia*, 3 Dallas, 378,

gives no countenance to the decision made by the Alabama Supreme Court in the present case, nor does it militate in the slightest degree against any of the positions here taken in behalf of plaintiff in error.

The decision in *Hollingsworth v. Virginia*, *supra*, plainly rests upon the ground that the Constitution of the United States, and the amendments thereto, are the acts of the people of the United States in the exercise of their unfettered sovereignty; that they are the supreme law of the land, and paramount to all the laws of the Union, State and Federal; and that the eleventh amendment to that Constitution was adopted by the people of the United States, in the exercise of their sovereignty in amending the Constitution previously adopted by them, in the exercise of their sovereignty, as the fundamental and supreme law in the Union, subject to change only by the same sovereign power which made it. Nothing of this kind can be truly said as to the mere State statute, which purported to repeal former statutes of the same State. The Federal Supreme Court could not derive any jurisdiction whatever, except under the Constitution of the United States. That court was not the inferior of any other court. There were no laws or Constitution higher than those of the government of which that court formed a part, which could keep alive or continue its jurisdiction, after the laws of its creator had withdrawn such jurisdiction. The withdrawal of *its* jurisdiction in pending suits, even though it impaired the obligation of contracts, was valid, because the people of the United States, or all the States, were *sovereign* in the matter of contracts, and could destroy them. No single State, nor the people thereof, have sovereignty as to contracts; for the Constitution of the United States expressly denies such power to the States. A State is not a sovereign, exempt from the operation of the Constitution of the United States in the matter of contracts, and that instrument may continue and keep alive the jurisdiction of a State court once vested, though its own laws attempt to withdraw it. This was notthe case with the jurisdiction of the Supreme Court of the United States in Hollingsworth's case. The distinction be-

tween that case and this is manifest, and does not require further argument.

It was decided in *Ex parte McNeil*, 13 Wallace, 237, that, "although a State statute can not confer jurisdiction on a Federal court, it may yet give a right to which, other things allowing, such a court may give effect."

So, too, although the Constitution and laws of the United States may not *create* jurisdiction of State courts, they may give rise to rights which a State court is bound to protect. The parties make the contract, and the State laws create the remedy and the jurisdiction of the State courts to enforce it. The State laws existing at the birth of the contract, or afterwards enlarging the remedy, erect the shelter of the contract, and give the jurisdiction of the State court to sustain it. These laws, and the jurisdiction thus given to State courts, are, by the Constitution of the United States, cemented to and joined in the contract. These it is the office of the Constitution to conserve, protect, and keep alive, that thereby impairment of the "obligation" of contract may be prevented.

The Constitution is the guardian, not the parent—the protector, not the creator of the remedy and obligation of the contract. The power of the Constitution to conserve and protect, is as measureless as the power of the State to declare the laws which fix the obligation when the contract is brought into being.

To the extent to which the existence and continued exercise of the "remedy," in force when the contract was made, are essential to prevent impairment of the "obligation," the Constitution seizes on them, and keeps them alive. If, as here, the contract is enforceable only through the remedy afforded by the exercise of the jurisdiction of a State court, the Constitution preserves and keeps alive that jurisdiction. In every such case, the mandate of the Constitu-

tion comes in between the Legislature and the repeal of laws giving the jurisdiction.

It will certainly not be contended, in the face of the numerous decisions of this court, that where the only remedy is through the exercise of jurisdiction by a State court, the taking away of that jurisdiction does not impair the obligation of the contract.

If such be the effect of a repealing law, the Constitution intervenes, and, not attempting to *create* jurisdiction, annuls the repealing act, thereby keeping alive and continuing the jurisdiction *created by the State.* Less than this will not prevent impairment of the obligation of the contract.

The cases of *White v. Hart*, 13 Wallace, 647, and *Osborn v. Nicholson*, 13 Wallace, 655, are directly in point. In the Georgia and Arkansas Constitutions, the State courts were expressly *deprived of jurisdiction* to try cases or enforce contracts growing out of the purchase or sale of slaves. Jurisdiction, in the first instance, to entertain such suits, must have been given by the State laws. But jurisdiction of such contracts having been given and existing in the State courts at the time the contracts were made, the Constitution of the United States *kept that jurisdiction alive, and required its continued exercise* for their protection. Hence, this court ordered a mandate to the State Supreme Courts to proceed in the exercise of jurisdiction, notwithstanding the *Constitutions of those States expressly prohibited such jurisdiction.* Those provisions of said State Constitutions were declared void. Is the repealing statute of Alabama of greater dignity or force than the constitutions of Georgia or Arkansas? The scope of the Alabama repealing act is identical with that of the provisions of the Georgia and Arkansas constitutions. The legal effect of that repealing act, if valid, is that "no court of the State shall have jurisdiction to try or give judgment on any contract made with the State."

See, also, *Farrington v. Tennessee*, 95 U. S. 685.

It was argued before the State Supreme Court, that the Alabama repealing act of the 18th of December, 1874, *"did not affect the contract, but only denies jurisdiction to her courts to enforce it."* This same proposition was emphatically repudiated, in *White v. Hart, supra.*

Speaking of similar prohibitions of jurisdiction to State courts, by the State constitutions or enactments, this court said: "The jurisdictional prohibition which they contain with respect to the courts of the State, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this Court."

Gunn v. Barry, 15 Wallace, 624.

If it be conceded that the National Government is powerless to compel a State of the Union to furnish a remedy in its own courts to enforce a valid contract made by it with one of its citizens, yet it would remain true, that when a State has made such contract and has provided a remedy for its enforcement against the State in its own courts, and the citizen has duly asserted his right of action under such contract, by suit properly brought according to the State law in the proper State court, one of the rights acquired by such citizen by the institution of such suit, is the right to invoke the exercise of the revisory jurisdiction of the Supreme Court of the United States whenever in such suit the highest State court shall have finally decided any Federal question against such citizen, and has thereby put an end to his suit, so far as the courts of the State are concerned. And this right to invoke the revisory jurisdiction of the Supreme Court of the United States can not be eluded, destroyed, or impaired, by any statute passed after such institution of such suit in the State court.

Railroad Company v. Maryland, 20 Wallace, 643.

Memphis v. United States, 97 U. S. Rep. 293.

The fund here in controversy was created by the National Government, by its proper department, the legislative, as

shown in said act of Congress of 1819. The power to create carries with it the power to preserve, by its proper department, the judicial; at least, to the extent of enforcing the application of the fund directed by the State legislature under and accordance with said act of Congress.

Farmers Nat. Bank v. Dearing, 91 U. S. R. 29.

The Constitution of the Union and "the laws made in pursuance thereof, are the supreme law of the land, * * any thing in the Constitution or laws of any State to the contrary notwithstanding"; and that law is as much a part of the law of every State as its own local laws and constitution, and is entitled to supremacy over them in all respects wherein it conflicts with them.

Farrington v. Tennessee, 95 U. S. Rep. 679.

White v. Hart, 13 Wallace, 647.

This act of Congress creating the fund, is not only part of the supreme law of the land, but from its acceptance by "the Convention of the said territory of Alabama," became operative also as a compact or contract, binding upon, and incapable of impairment by the State of Alabama, as to the fund in question. It was one of that class of "laws which amount to propositions on the part" of the National Government, which, if accepted by a convention authorized to accept, and thereby to bind the State of Alabama in the future, became a binding contract upon the State.

Cooley's Const. Limitations, 1st edition, page 284.

The State legislature was incapable of doing anything, in conflict with the said act of Congress, in reference to the

fund here in controversy. What was done by that legislature in accordance with that act of Congress, has the same effect, in favor of the beneficiary or appointee, as if it had been done by Congress itself; because it was done in execution of the power entrusted by said act of Congress to the State legislature. The several acts of the State legislature, directing the appropriation and application of the fund to an object within the scope of that act of Congress, and selected or appointed by that legislature, were in accordance with that act of Congress, and may well be treated as giving the same rights as if they had been expressly authorized and sanctioned by that act of Congress and the authoritative assent of the State thereto. And the right of the plaintiff in error thereunder is plainly "a right which has arisen upon a contract, or a transaction in the nature of a contract authorized by statute," and this right "has been so far perfected that nothing remains to be done by the party asserting it." This was the position of the claim of the plaintiff in error at and before the repealing State enactment, upon which alone the suit of plaintiff in error was dismissed. That repealing enactment did not, and could not, under the law of the land, affect the aforementioned vested right of plaintiff in error.

Steamship Co. v. Joliffe, 2 Wallace, 457, 448.

*VII. The Constitution of Alabama gave a consent to sue the State, which the legislature could not take away, as to pending suits.*

Whether or not the plaintiff in error, in a case like this, had a contract with the State of Alabama, and a vested RIGHT OF SUIT against it, are questions upon which the decisions of the State courts construing its own constitution and laws, are not binding upon the Supreme Court of the United States.

Delmas v. Insurance Co. 14 Wallace, 661.

Murdoch v. Memphis, 20 Wallace, 590.
Jefferson Branch Bank v. Skelly, 1 Black, 436.
University v. People of Illinoes, at last term.
Republican River Bridge Co. v. Kansas Pacific R. R. Co. 92 U. S. 315.
Railroad Company v. Maryland, 20 Wallace, 643.

The State Constitution of 1819, which declares the "General Assembly *shall direct* by law, in what manner and in what courts suits may be brought against the State"—Cons. Art. 6, § 9—and laws passed in pursuance thereof, authorizing suits against the State, were both in force, when the act of February 18th, 1860, was passed, loaning and appropriating the three per cent. fund, at which date the rights of the plaintiff in error, or those through whom it claims, first attached.

Certainly this Constitution intended to confer the *right* of *suit* against the State. No plainer command could be addressed to the legislature. The language is imperative—the legislature "*shall direct*," &c. This view of the Constitution was twice taken by the highest court of Alabama. In *White v. The Governor*, 18 Ala. top of page 769, CHILTON, J., says: "The *Constitution has made it the duty of the legislature to direct in what manner and in what courts suits shall be brought against the State.*" In the case of *Ex parte Green* and *Graham*, 29 Ala. page 61, STONE, J., speaking of this same constitutional provision, calls it a "*constitutional injunction*," which the legislature "*obeyed.*"

Under the Constitution of 1819, the very moment the legislature directed in what manner suits should be brought against the State, the grant of the right of suit became perfect and vested, in each citizen who then had a cause of action or a right to assert against the State. The legislation authorizing suits, placed the grant of the right beyond recall. Before that, the grant was not complete. The right having arisen, and the Constitution having declared it should exist,

a subsequent legislature could not take away the right. No legislature has powers which are denied by the Constitution. The constitutional requirement that the citizen should have the right to sue, having been carried out by appropriate legislation, the General Assembly was powerless to legislate adversely to that right. The sovereign power, in its organic law, declaring that it *consents to be sued*—none of its departments can say that it shall *not* consent. A right of suit thus acquired—even when tested by the State Constitution alone—is a perfect, vested, constitutional right.

The fact that such a provision was put *in the Constitution*, is persuasive to show that the framers thereof intended to confer a *right* of suit against the State. It had never been doubted that a State might permit itself to be sued in its own courts. If the language of the Constitution meant only to acknowledge the right of a State to allow suit against itself, as a matter of grace, placing the article in the Constitution was a vain and useless thing. Such a purpose is not to be imputed to the framers of a Constitution.

State v. Curran, 7 English, 321.

In *Gould v. Hayes*, 19 Ala. 462, speaking of a statute which provided that a "*judge shall have full power*" to do certain acts, the court said: "Such words, when used in a statute, are *regarded as peremptory*, where the public or an individual has a right *de jure* that the powers conferred should be exercised."

9 Porter, 390.

5 Johns. Chan. 113.

1 Ver. 152.

3 Arkansas, 166.

Salk. 609.

Such language was a grant of power, the exercise of which did not rest in the option of the depositary of the power. Surely, when a peremptory constitutional mandate has been obeyed by the passage of laws authorizing suits against the State, courts can not hold that any thing less than a "*constitutional right of suit*," vested as to contracts then in force, is thereby conferred, and that such was the intent of the

framers of the Constitution. The office and intent of Art. 6, § 9 of the Constitution of 1819, and the similar provisions in the constitutions of 1865, and 1868, were to create the *right* of suit, and to stand as *enduring evidence* of the State's *consent to be sued*, and to put it beyond the power of any of the State's officers or servants—executive, legislative or judicial—to recall or impair that consent.

This constitutional grant of a right was not *self-executing*, but having been executed, by appropriate legislation, the right can not be withdrawn, after being acted on; because such withdrawal is contrary to the declared will of the sovereign. A repealing law, attempting such withdrawal, violates the *State* Constitution, as would any other law (whether relating to contracts or not) which contravenes the declared will of the people, as promulgated by the Constitution.

In the opinion in *Ex parte State*, 52 Ala., the court seemed to lay stress on the fact that the constitutions of 1865 and 1868, when speaking of suits against the State, changed the phraseology used in the Constitution of 1819. These later instruments provide that suits against the State "*may* be brought," &c. This, however, is a matter of no moment. The rights here asserted arose under the Constitution of 1819.

Even though the exercise of the power to pass laws authorizing suits against the State, under the constitutions of 1865 and 1868, was permissive merely, yet when that power was exercised, the rights thereby acquired were as binding and fully as vested, as though these constitutions had laid a mandatory injunction on the legislature to pass such laws. As to the effect of the word *may*, when used in this connection, see Smith's Commentaries on Statutes, §§ 595, 604; *Rex v. Everet*, case temp. Hardwicke, 261.

"It is a general rule in the construction of public statutes, that the word "*may*" is to be construed "*must*," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power; and *in all cases the construction should be such as carries into effect the true intent and meaning of the legislature.*"

Minor v. Mechanics' Bank, I Peters, 46.

Supervisors v. United States, 4 Wallace, 435.
City of Galena v. Amy, 5 Wallace, 705.

VIII. *The State of Alabama is trustee in its mere corporate, and not in its sovereign capacity, and can not invoke sovereignty to defeat a suit to call it to account for the trust fund.*

The nature of this trust, and the manner in which it was created, make the State a trustee in its mere *corporate capacity*, and not in its sovereign character.

In the case of the *United States Bank v. The Planters' Bank of Georgia*, 9 Wheaton, 904, this court speaking of the relations of the State to a bank, of which it was not only a proprietor but a corporator, says: "It is, we think, a sound principle that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, *of its sovereign character, and takes that of a private citizen.* Instead of communicating to the company its privileges and prerogatives, it descends to the level of those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

See, also, Bank of the State of Alabama v. Gibson, 6 Ala. 814.

Curran v. Arkansas, 15 Howard, 309.

"The truth is, States and cities, when they borrow money and contract to repay it with interest [or, we may add, when they enter into contracts like this], *are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts, between private persons.* * * * * A promise to pay, with the reserved right to deny or change the effect of the promise, is an absurdity."

Murray v. Charleston, 96 U. S. p. 445.

The acceptance of a trust fund—the loaning it out that it might increase—selecting routes—and supervising the building by private persons of railroads belonging to private parties, are not sovereign duties or acts, though the State acts in such matter as the trustee.

Vattel says that "the promises, the conventions, all the private contracts, of the sovereign are naturally subject to the same rules as those of private persons."

Book 2, c. 14, § 213, and p. 209 of Edition 1793.

Phillemore, in his work on International Law (vol. 2, p. 103–133, Edition of 1854), speaking of the voluntary appearance of one sovereign, even in his political character, in the courts of another—the King of Spain was plaintiff in an English court—says: "He brings with him no privileges which can vary the practice or displace the law applying to other suitors in those courts."

He cites as authority: King of Spain v. Hudder & Wilder, 1 Clarke & Finnelly, 348; and,

Rothschild v. Queen of Portugal, 3 Young & Collyer, 594.

In *The Duke of Brunswick v. King of Hanover* (which is given in full in Phillemore on International Law, Book 2, appendix, p. 395). the King of Hanover was also a peer of the realm in England. The Duke of Brunswick filed his bill against the king, then temporarily in England, to have declared void a certain instrument (which the court held was a mere "sequel of a political revolution," or State document), and to call the defendant to account for the property and effects acquired thereunder. The king moved to be released from process, which was denied, and he then appeared, and filed a demurrer for want of jurisdiction. "*Held*, that the defendant was exempt from the jurisdiction of the courts in this country, for any acts done by him as King of Hanover, or in

his character of Sovereign Prince; but *that being a subject of her Majesty Queen Victoria, he was liable to be sued in the courts of this country in respect to any acts and transactions done by him, or in which he might be engaged as such subject.*"

In that case (see page 411) the Master of the Rolls said, among other things: "I am of opinion that it is *not contrary to any principle, and not unreasonable to consider that in the contemplation of the courts of this country, the inviolability which belongs to His Majesty the King of Hanover, as a Sovereign Prince, ought to be, and is modified by his character and duties as a subject of the Queen of England.*"

In one feature that case is much like this. Alabama territory, previous to its becoming a State, was in a state of subjection to the United States. The King of Hanover was before, and after he became king, a subject of the Queen of England. In the matter of enforcement of contracts, by force of the terms of the constitution of the United States, independently of the compact of 1819, Alabama remained subject to the paramount sovereignty of the Union in that matter, though as to some others it possessed absolute sovereignty—just as the King of Hanover, though a subject of the Queen of England, was as to other matters a Sovereign Prince. As to matters done by the king as a subject, or in his private capacity and not *as sovereign*, he was suable *without his consent*, though he was a sovereign. Whatever Alabama did in its corporate capacity—whatever the State did, with respect to this fund, in any capacity, in which it did not occupy the relation of absolute sovereignty to the United States—as to that, the State is suable in the courts, *without its consent*, according to the principles declared in that case.

Again: While consent cannot give jurisdiction of the subject matter of the suit, it will confer *jurisdiction of the person*. The courts of this State have always had jurisdiction of the subject matter of this suit. The voluntary appearance and answer of the State—such appearance being the lawful ac

and will of the sovereign—was *a consent to be sued*, and gave jurisdiction in the most solemn form. Jurisdiction of the subject matter still remaining in the State court, can the jurisdiction of the person, already attached and given by the solemn act and consent of the sovereign, be defeated, contrary to the will of the court, by the sovereign's unconditional withdrawal of his appearance?

When the sovereign voluntarily appears and submits to jurisdiction of the person, in a matter involving only private property rights, as distinguished from the public property of the Crown or State, he becomes bound to submit to the continued exercise of that jurisdiction, at least until the court ascertains and declares the right—even if those means of enforcing it can not be exerted against him, which would be employed against a mere private person. When the sovereign in such a case—after voluntarily submitting to jurisdiction over his person and consenting to be sued, and raising issues on the merits—asks the court to make an order which in effect allows him to depart the court unconditionally and without day, he becomes the *actor*.

Whenever he becomes *actor* in a court of equity, he must do equity. The sovereign in such a case "stands on an equal footing with the subject."

No court would allow a private person to withdraw his appearance absolutely, to the prejudice of the opposite party. If allowed at all, it would be on terms. When this suit was brought, the law declared "it must, *in all respects*, be governed by the same rules as suits between individuals;" and the sovereignty here asserted can claim no higher privileges than the common citizen.

The repeal of the law authorizing suit, in a case like this, will not divest jurisdiction once vested. "There must be seizure to vest the jurisdiction [in admiralty]. But it is not believed that the continuance of possession is necessary to continue the jurisdiction. It is a *general principle that jurisdiction once vested, is not divested, although a state of things should arise in which original jurisdiction could not be exercised.*"

Marshall, C. J. in U. S. v. Schooner Little Charles, 1 Brock. 355, next to last paragraph.

The motion of the Attorney-General to dismiss this suit, on the grounds on which that motion was made and prevailed, was, in legal effect, but asking leave to withdraw absolutely the appearance of the State—which appearance was a consent to be sued, and a submission to the jurisdiction of the State court. The jurisdiction of the subject matter of the suit was not attempted to be taken away by the repealing act. It assumed to take away only jurisdiction of the person; and the motion made and granted was not, in legal effect, a motion to dismiss for want of jurisdiction of the subject matter, but for want of jurisdiction of the person, which had already been acquired by the voluntary and lawful act of the State, and remained notwithstanding a state of things arose in which "original jurisdiction could not be exercised."

1 Brock. 355.

A State of the Union may sustain the character of a trustee.

Perry on Trusts, § 41.

It is certain the King of England may be a trustee.

Penn v. Lord Baltimore, 1 Vesey Senior, 453.

In this case, at all events, Alabama is a trustee. The United States, as a sovereign, had the right to raise a trust, and to appoint a trustee of funds it donated, and the State as one of the conditions on which it was admitted into the Union, accepted said trust.

Whether the King of England could be subjected to the equities of the *cestui que trust*—as to property in the king's hands—as in the case of a private trustee (in other words, whether such rights could be enforced against him), seems to be an open question in the courts of England. Mr. Hill, in his work on Trustees, 3d Edition, p. 76, says "there are not wanting dicta in favor of the affirmative of the proposition." He cites Lord Hardwick in *Penn v. Baltimore*, the Master of the Rolls in *Burgess v. Wheat*, and Lord Mansfield in the same case. Lord Keeper Northington, speaking of an equity

against the sovereign, says: "I do not know that it has ever been so determined. Lord Hale thought the king should, because it is an ancient right which the party is entitled to in equity. Baron Atkyns thought the same, because he saw the same equity against the crown as against a common person. Yet it is observable that there is in that case (*Pawlett v. Attorney-General*) a recognition of the equity, without any declaration of the remedy. Whether this remedy has since been settled in the Exchequer where it alone can be, I really do not know; but I hope it is so settled, for I see a great deal of equity to support the opinion of Hale and Atkyns. *I hope there is no equity that the subject is not entitled to against the crown.* But I own, upon very diligent inquiry and consideration of the case, I at present think the arms of equity are very short against the prerogative."

*IX. Alabama's sovereignty not involved in the enforcement of the decree here sought.*

It will be remarked that the difficulty experienced by the English courts, in suits against the sovereign as trustee, does not go to the right to judgment or decree, *but only to the mode of enforcing it.* None of the English judges intimate a doubt as to power of the courts to render a decree, where their laws in any case afford means of enforcing it.

Happily, in this country, there is no "prerogative" in a case like this, which can shorten the arms of equity, or claim sovereignty over the Constitution.

A favorite argument of those who deny jurisdiction in cases like this, is that the dignity of the courts prevents their entertaining causes in which their judgments can have no operation. "This reason will not apply to any case, *where the judgment will have any effect whatever.*"

Marshall, C. J., in U. S. v. Schooner Little Charles, 1 Brock, 355.

Here, we have ample legal remedies for enforcing satisfac-

tion of judgment against the State; but even if the court had not such ample power, the valuable remedies and rights flowing from the judgment, against State officials who might refuse to carry out the State statutes—even if the State itself could not practically be effected—would certainly take this case out of the rule that vain and useless judgments will not be rendered.

The laws of the State, which are irrepealable by reason of the Constitution of the United States, furnish a mode for enforcing satisfaction of the decree—*by warrant of the comptroller on the treasurer*. The State court, in enforcing these State laws, in a case like this, acts not alone under the laws made by the State, the trustee; under the Constitution of the United States, the State court becomes, after jurisdiction once given and attached, *pro hac vice* a tribunal to administer the laws of a higher power, in a matter as to which the State is not, and never has been, sovereign.

The sovereignty of Alabama is in no wise involved in this suit. Her agent, the legislature, has wasted, diverted, and refuses to account for a trust fund—the bounty of the United States—belonging to the plaintiff in error, which went into the State treasury. The State can not claim or hold this fund, which has gone into her treasury, by means of the breach of duty of its agent, the legislature.

United States v. State Bank, 96 U. S. 30.

The case of the *United States v. State Bank, supra*, is very like this in one respect. There the fund was in the treasury of the United States by the fraud of its agents—here it went into the treasury of the State by its own breach of duty as trustee of an express trust. In that case the court, after citing many authorities, say: "In these cases, and many others which might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract, by

which they might well be bound in virtue of their corporate character. *Their sovereignty is in no wise involved.*"—p. 36.

The equity of the plaintiff in error can not be doubted; it has, as already shown, vested rights by contract; it has performed the conditions on which it is entitled to the appropriation; it has been refused any just accounting or settlement, and the trustee has diverted the fund, contrary to the provisions of the laws under which the plaintiff in error became entitled to it. It is not possible, "if the rules of law applicable to individuals are applied to the State," to avoid a decree in favor of the plaintiff in error. The State, as trustee, is answerable for the wrongful acts of its legislature, passed during the civil war, with respect to the fund, and also for the acts of its officials done under color of such laws, as if those acts had been passed and done, when there was no civil war. The right of the plaintiff in error could not be impaired by the State, either before, or during, or since the civil war.

Keith v. Clarke, 97 U. S. 454.

*X. As to the decree which this court should render.*

The main allegations of fact in the bill are substantially admitted in the answer. The decree *pro confesso* on the amendment is an admission of its allegations. The public laws of Alabama and of Congress, set out in this brief, are judicially noticed by the court. The substantial averments of fact necessary to make out the case of the plaintiff in error, are established, and all that remains is an application of the law to these established facts.

Section 3034 of the Code of Alabama of 1852, provides that "the Supreme Court may, upon reversal of any judgment or decree, remand the same for further proceedings, or render such judgment or decree as the court below should have rendered, when the record enables them to do so."

Under the practice of the Supreme Court of Alabama, this was a plain case for rendering the decree which the court below should have rendered, or remanding it with directions to render the proper decree.

Gentry v. Rogers, 40 Ala. 442.

In *Williams v. Barnes*, 28 Ala. 617, the Supreme Court of Alabama said: "It would be improper for us to establish a practice of remanding reversed chancery causes, where the record before us enables us to render the decree which the court below ought to have rendered, unless we are able clearly to perceive that such a course is demanded by justice. All the decisions are against such a course."

See, also, Pike v. Bright, 29 Ala. 332.

If this court should be of opinion that the plaintiff in error is entitled to relief, it would, in an equity case like this, so mould its decree as to effectuate that right. We submit that the proper judgment here, would be to reverse the decree of the State Supreme Court, and remand the cause to that court, with a mandate to enter a decree that the decree of said Chancery Court be reversed and that the plaintiff in error is entitled to relief, and to an account of the trust fund mentioned in the pleadings, and directing remandment of the cause, for that purpose, to the Chancery Court of Montgomery.

Murdoch v. Memphis, 20 Wallace, p. 633, (proposition 7).

The right of the plaintiff in error to a warrant on the treasury, is made to hinge on the certificate of the judge and clerk of the *State* court, rendering the judgment, that the recovery is just. A decree entered by this court, might fur-

nish a pretext for contending that there was no right to a warrant, except on certificate of a *State* judge and clerk, that the recovery in a *State* court was just.

If the United States had made a compact with a foreign power, in the enforcement of which citizens of a State or of the United States were interested, the United States would, in a proper case, compel performance by negotiation or arms. Here, the United States can not enter into diplomatic negotiations with the State of Alabama, or demand indemnity of it; nor, on the other hand, can it compel the execution of the compact by force of arms, so long as Alabama does not forcibly oppose the operation of Federal laws.

If the contention of the State, in this case, be correct, that this court has no authority to give relief, the United States has far less power to prevent invasion, by a State of the Union, of rights of citizens derived from a compact made by such States with the United States, than it would have against a foreign power, disregarding its solemn engagements and compacts with the United States; and the citizen would be in a far more pitiable condition when wronged by a State of this Union, than where a foreign power trampled on his rights.

The only department of the government of the United States which can relieve the citizen, in a case like the present, is the judicial department. If that department is powerless, then here is a plain case of a legal right derived from contract and compact, and no remedy whatsoever for its enforcement. The United States must remain a mere idle and helpless spectator, while solemn compacts and engagements made with it are recklessly defied and broken.

The injustice and wrong worked by the judgment of the Supreme Court of Alabama, are manifest.

The corporate capacity of the State has been invoked to get the trust fund, and its sovereign character to destroy and withhold that fund. The State holds as trustee—it assumes to withhold as sovereign. To sustain the State legislation here complained of, is virtually to allow the trustee to render judgment, in its own favor, without cause or hearing, against the *cestui que trust*, suing the trustee in its own courts. This action of the State has no element of due "process of law," and savors of a judicial proceeding only because the State has attempted to veil its wrongful acts, by compelling its courts to register its will.

And now the State here demands a judicial death for its own "contract," and asks that the only "remedy" given by its laws be buried, while yet it is alive. It appeals to this court to approve the despoilment of the *cestui que trust* by the trustee, and strives, by invoking the majesty of sovereignty, which in its highest and noblest attributes "can do no wrong," to stay the outstreched arms of this august court, to which the despoiled and helpless victim has been driven for shelter and protection.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE SOUTH AND NORTH RAILROAD COMPANY,

*vs.*

THE STATE OF ALABAMA.

No. 22.

BRIEF AND ARGUMENT OF JOHN T. MORGAN,

*For Defendant in Error.*

# In the Supreme Court of the United States.

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY, Plaintiff in Error, *vs.* THE STATE OF ALABAMA. } No. 22.

BRIEF OF THE FACTS.

On the 4th of April, 1874, the South and North Alabama Railroad Company, a corporation chartered and organized under the laws of Alabama, exhibited a bill in the Chancery Court of Montgomery county against "The State of Alabama" as the sole defendant. In this bill it was claimed that the State was liable to the Railroad Company as trustee for a large sum of money received by the State from "the three *per cent.* fund" arising from the proceeds of the sales of public lands under the act of Congress of March 2, 1819, "to enable the people of Alabama Territory to form a Constitution and State Government, and for the admission into the Union upon an equal footing with the original States."

An amended bill was afterwards filed in December, 1874.

The State, by its Attorney General, and by its Solicitor, appeared in the cause, and filed its answer to the original bill on 20th of May, 1874. No answer was made to the amended bill.

On the 11th of May, 1875, the State, by its Attorney General, Mr. Sanford, entered a motion in the cause to dismiss it, and to strike it from the docket "on the grounds that there is no law which authorizes suits to be brought or prosecuted against the State of Alabama; and that this suit cannot be further maintained because the law which may have authorized its institution has been repealed."

On this motion the Chancery Court dismissed the bill.

The complainant appealed from that decree to the Supreme Court of Alabama, and, at its December Term, 1875, that Court affirmed the decree of the Chancery Court.

At the time when the original bill was filed, the statutes of Alabama permitted citizens of the State, and domestic corporations, to sue the State in the Chancery Courts, as well as in the Courts of law, but all such statutes were repealed by act of the General Assembly, approved December 18, 1874, as follows:

"AN ACT to repeal Sections 2,534, 2,536, 2,571, and 3,323, of the Revised Code of Alabama.

"*Be it enacted by the General Assembly of Alabama*, That sections (numbered as above) be, and the same are hereby, repealed.

"SEC. 2. *Be it further enacted*, That all laws and parts of laws in conflict with the provision of this act, or which make any provision for bringing or conducting suits against this State be, and the same are hereby, repealed."

ARGUMENT FOR DEFENDANT IN ERROR.

1. The only question passed upon by the Supreme Court of Alabama was the jurisdiction of the Chancery Courts of that State to hear and determine a suit against the State after the passage of the act of December 18, 1874. That jurisdiction was denied, and only that question can be considered on this writ of error.

2. The State Courts have not passed upon any Federal

question, and there is no denial of any right secured to the plaintiff in error by the laws or Constitution of the United States. There is nothing in this record to give the Supreme Court of the United States jurisdiction of this cause, and the defendant in error moves to dismiss the writ of error on this ground.

Smith *vs.* Adsit, 16 Wall, 185, and authorities cited in that case.

3. The question whether the State of Alabama became a trustee for the Railroad Company to hold a part of the three per cent. fund in trust for that Company has not been decided.

It has only been decided that the Chancery Courts of Alabama have no power to entertain a suit against the State to enforce the demand for an account against the alleged trustee.

It is held that the State is not bound to answer this demand in its Courts, which it may choose to meet and provide for by act of the General Assembly.

This subject is ably treated in the opinion of the Supreme Court of Alabama, by Brickell, C. J., in *ex parte* State of Alabama, 52 Ala. Reports, 231, and is decided unanimously by a full Court.

The repealing statute is held to be valid, and that it sweeps away the jurisdiction of the Courts to render decrees against the State.

4. The plaintiff in error claims its rights in the three per cent. fund through the statutes of Alabama, and not through the act of March 2, 1819, admitting the State into the Union. If the State of Alabama had denied to the Railroad Company all right of participation in the fund, it would not have violated its duty under the act of Congress. That act imposes no such duty upon the State as to provide for this Railroad Company; and if in the course of its administration of this fund it has come under any obligation to its own citizen or

domestic corporation which it has failed or refused to perform it has only violated its own statutes and not the act of Congress.

If the relations of the State to the Railroad Company have made the State amenable to the charge of having violated its contract, it does not follow that the Supreme Court of the United States can decide that question until the Supreme Court of the State has made a decision upon it.

On the face of the bill in this case, the complainant asks for a decision upon the liability of the State under its own statutes, and not upon a construction of the act of Congress of March 2, 1819.

People *v.* Central Railroad, 12 Wallace, 455.

5. The Supreme Court of the United States has no warrant in the Constitution for regarding a State as anything else than a sovereign power, especially for the purpose of extending over it the jurisdiction of the Federal Courts.

The 11th amendment of the Constitution is an express abridgement of the "judicial power" of the United States, and was designed to leave it to the States to determine, each for itself, in what cases they would consent to be sued in their own Courts, and to deny the right of any person to sue a State without such consent.

Chisholm *v.* Georgia, 2 Dallas, 419, 475; Hollingsworth *v.* Virginia, 3 Dallas, 378; Cohens *v.* Virginia, 6 Wheaton, 294.

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